Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-63

CHARLES O. ROSS,

Petitioner,

v.

HONORABLE FRANK REDA, Judge,
Franklin County Municipal Court,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No.

CHARLES O. ROSS,

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v.

HONORABLE FRANK REDA, Judge,
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Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Petitioner, Charles O. Ross, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on February 13, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 510 F. 2d 1172 and is printed in the Appendix at p. 11a. The opinion of the United States District Court for the Southern District of Ohio, Eastern Division, is unreported and is printed in the Appendix at p. 14a. The foregoing opinions relate to the petition for a federal writ of habeas corpus.

The underlying conviction in July, 1972 was in the Municipal Court of Columbus, Ohio. That conviction was affirmed by the Franklin County Court of Appeals on March 20, 1973. State v. Ross, 36 Ohio App. 185, 304 N.E. 2d 39, review denied, 46 Ohio Bar 1270 and 1276 (Ohio S. Ct. 1973), appeal dismissed and certiorari denied, 415 U.S. 904 (1974). The Franklin County Court of Appeals opinion is printed in the Appendix at p. 39a.

An earlier unpublished opinion of the Franklin County Court of Common Pleas disqualifying the original trial judge is printed in the Appendix, p. 67a.

JURISDICTION

Petitioner was convicted in the Columbus, Ohio Municipal Court of failure to depart from school property, interference "at an emergency," and simple assault. In addition to fifty dollar fines on each charge, petitioner was sentenced to 30 days in jail for failing to depart. The 30 day sentence, except

for six days already served, has been stayed pending final disposition of this litigation.

Having exhausted State remedies, petitioner unsuccessfully sought a writ of habeas corpus in the United States District Court for the Southern District of Ohio, Eastern Division. On appeal to the Sixth Circuit, the denial of relief was affirmed. No petition for rehearing was filed.

On May 6, 1975, Mr. Justice Stewart, as Circuit Justice, granted an extension of time within which to file a petition for a writ of certiorari, up to and including July 12, 1975.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether a State court's use of its powers with respect to pro hac vice admission of attorneys to deny to an accused the services of his retained chief counsel, an attorney in good standing with whom he had prior and successful relationship, premised on the State's desire to punish counsel for his outspoken views upon a contraverted constitutional question and wholly unrelated to anything counsel had done in this case, violates the Due Process and Right to Counsel clauses of the Fifth and Sixth Amendments as incorporated in the Fourteenth Amendment?

2. Whether under the First, Fifth and Sixth Amendments as incorporated in the Fourteenth Amendment, in the absence of a finding of specific necessity showing that the administration of justice or a fair trial is threatened in a particular case, a State may, by blanket rule applicable to all cases, prohibit attorneys of record from making public comment about a case in litigation and may enforce that prohibition by preventing a defendant in a criminal case from having retained counsel of his choice because of speculative future violations of the rule?

3. Whether affirmance on appeal of a State criminal conviction on a novel theory and factual determination unrelated to the trial court's rationale for its critical ruling violates the Fourteenth Amendment's Due Process clause, especially where the defense strategy at trial was premised upon the stated rationale for trial court's ruling?

4. Whether the Due Process clause of the Fourteenth Amendment requires that a trial judge, upon replacing another who was removed for prejudice, make a genuine de novo determination of each in a series of rulings by the predecessor judge, many of which were upon issues which entailed exercises of judicial discretion, and which were made after the affidavit of prejudice was filed?

5. Whether 28 U.S.C. §2254(d) precludes a federal habeas court from independently determining the legal significance of "facts" which were first found by a State appellate court that

lacked fact-finding authority and which are plainly not supported by the record?

CONSTITUTIONAL AND STATUTORY PROVISIONS AND REGULATIONS INVOLVED

1) The First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States are printed in the Appendix at p. 1a.

2) 28 U.S.C §2254(d) is printed in the Appendix at p. 3a.

3) Ohio Revised Code, §2909.21; 2901.25; 2923.43 are printed in the Appendix at p. 5a.

4) Canon 7 (EC 7-33) of the Code of Professional Responsibility and Disciplinary Rule DR 7-107 B, C, and D, adopted by the Supreme Court of Ohio are printed in the Appendix at p. 7a.

STATEMENT OF THE CASE

Professor Charles O. Ross, a tenured faculty member at Ohio State University in Columbus, Ohio was arrested on May 25, 1971, when he attempted to engage a police official in conversation during community observation of the reopening of a municipal high school. 1/

1/ The Spring of 1971 was a time of racial unrest throughout the nation. In Columbus, black high school and college students held marches and rallies, and

footnote continued on next page.

The arrest was the culmination of a substantial history of charges and countercharges between Professor Ross and Columbus municipal leaders as to racial

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1/ continued from previous page.

otherwise engaged in protected political activities.

Linden McKinley High School had a largely black student body. Racial conflicts had occurred at the school, which thereafter closed for a period of days. It was to reopen on the morning of May 25, 1971. Because of anxiety that a disturbance might occur, school officials had invited black clergy to come to the school both as observers and to help maintain order. In addition to the clergymen, many other concerned black citizens came to the school's auditorium and peacefully assembled. Professor Ross was among them. At an early hour, some fighting among students was observed in the school halls. Police were called in.

Thereafter, then City Safety Director James Hughes -- since elected City Attorney, and, in that capacity, counsel for respondent -- came to the school and urged that it be closed. At Hughes' suggestion, an instruction to the observers and students in the auditorium that they leave the school or return to their classrooms, was issued by the principal. The incidents underlying this case followed the principal's allegedly telling all outsiders to leave the school's auditorium.

issues. 2/ Professor Ross was charged with failing to depart the premises, interfering with police at the scene of an emergency, and assault by threatening a police employee who had just punched petitioner to the ground in the fingerprint room.

Petitioner made arrangements to be represented by an out-of-state attorney, Mr. William Kunstler, in proceedings growing out of the May 25th events. The first such proceeding in which Mr. Kunstler participated was an administrative hearing at the University to determine whether petitioner should be suspended from the faculty during the pendency of criminal proceedings. Mr. Kunstler's representation was without untoward incident and petitioner pre-

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2/ Petitioner joined the University faculty as its first Director of the Black Studies Division in the College of Humanities. He entered this position after an extensive search by a coalition of students, faculty members, and unaffiliated citizens, with a mandate to establish Black Studies as an integral part of the curriculum. Petitioner's acceptance as Director by the University's Board of Trustees was controversial. A continuous campaign to force him from his position was waged by one local newspaper. A number of municipal and University officials regularly fueled that newspaper's inflammatory reportage.

vailed. 3/

Thereafter, under Mr. Kunstler's supervision, numerous pretrial motions were filed in the municipal court by local counsel. Some motions raised basic constitutional issues, including inter alia systematic exclusion of blacks from jury rolls. One of the motions was for Mr. Kunstler's admission pro hac vice.

At a pretrial hearing in March, 1972, Chief Municipal Judge Fais announced the "very real possibility" he would exclude Mr. Kunstler from participating, stating that the matter was purely discretionary, and that he was not required to give a reason. Judge Fais thereupon denied the motion for pro hac vice admission, obstensibly because it was not signed by Mr. Kunstler, but granted leave to refile the motion if personally signed by Mr. Kunstler. This was promptly done.

On April 3, 1972, Mr. Kunstler was formerly introduced to the court by local counsel, and presented his credentials. Judge Fais showed open hostility toward the defense, highlighted by an extended and gratuitous denunciation of Mr. R. Raymond Twohig, Jr., petitioner's local counsel, charging him with misappropriating funds from the Ohio State University School of Law to assist in the defense

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3/ Mr. Kunstler was also associated as counsel, in a federal civil rights suit brought by Professor Ross against the University.

of Professor Ross. 4/ In addition to his unfounded charges made against Mr. Twohig in court, Judge Fais, while addressing a church group, denounced Mr. Kunstler and F. Lee Bailey. He also granted interviews to the local press, at which, while still sitting as the judge on the Ross case, he discussed the case.

In the wake of these developments, petitioner, on the morning of April 6, 1972, filed and served an affidavit of prejudice and motion to disqualify Judge Fais. Later that day, and during the next five days, Judge Fais filed written opinions summarily denying each pending pretrial motion, including the motion for pro hac vice representation by Mr. Kunstler.

In denying petitioner representation by Mr. Kunstler, Judge Fais retreated from his prior claim of unfettered discretion. His opinion, purporting to offer justification for his ruling, declared that "the applicant's [past] conduct was unprofessional," and hence Mr.

4/ Judge Fais had previously insisted on venting this same baseless allegation in open court during a totally unrelated trial at which Mr. Twohig (a professor of law) was supervising a student's appearance as defense counsel. On that occasion, Judge Fais demanded answers from Mr. Twohig, under threat of contempt, as to the terms of his contract with the University.

Kunstler "has not qualified himself to be admitted pro hac vice in this case." But, as the United States District Court later noted, "The Court of Appeals for Franklin County, Ohio held that Mr. Kunstler's [alleged past conduct was] not sufficient grounds to exclude him, because there was no evidence of record that Mr. Kunstler had, in fact, engaged in any alleged unprofessional conduct." See opinion of District Court, 27a; opinion of Court of Appeals for Franklin County, 39a.

On the afternoon of Thursday, July 6, 1972, the Franklin County Court of Common Pleas, responding to the motion to disqualify, ordered that Judge Fais not hear the case and a substitute Judge should be assigned by lot. 5/ Judge Reda, respondent herein, was so selected.

Later that afternoon, Judge Reda denied a defense motion for continuance and adjourned until the following morning. At that time,(Friday, July 7) he announced that the night before he had reviewed Judge Fais rulings and would "disturb" none of them. As the whole

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5/ The Sixth Circuit erroneously declared that Judge Fais "disqualified himself." To the contrary, he persisted in issuing rulings after being served with the affidavit of prejudice. His participation in trial proceedings ended only when he was ordered off the case by the Court of Common Pleas..

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record demonstrates, Judge Reda made no supplemental findings. He refused petitioner's repeated request that he review Judge Fais' rulings de novo. He claimed that Judge Fais made no error of substantive law, and despite Judge Fais' removal and the reasons therefore, he considered it highly improper to substitute his own judgment for Judge Fais' as to discretionary matters. He again denied a continuance and fixed the date of the trial as July 10, the following Monday.

On the morning of trial, petitioner again requested reconsideration of the exclusion of Mr. Kunstler as chief counsel. Judge Reda allowed the "indulgence" of permitting petitioner to "clarify . . . the record." Mr. Twohig thereupon reminded the successor judge that the Court of Common Pleas, in ordering Judge Fais off the case, had stated that Judge Fais' "rulings on[the defense] motions might be construed as bias on his part against either the defendant or his attorneys." (emphasis supplied). Additionally, Mr. Twohig pointed out,as the reviewing courts subsequently held, that there was no evidence of record to support the factual findings upon which Judge Fais had excluded Mr. Kunstler from the trial. Judge Reda did not respond to these assertions.

Thereafter, Mr. Kunstler was permitted to address the court. In the course of the ensuing colloquy, Judge Reda said,

> * * * I am concerned about your conduct outside the courtroom * * * I had reports of your conduct [the source and substance of which are not in the record] * * * Now, do you have any statements that you would like to make to the Court with respect to what you believe an attorney's conduct should be outside of the courtroom?

Mr. Kunstler replied:

> Outside of the courtroom I have every right to all the First Amendment privileges of any other person * * * [U]nless you show by an evidentiary hearing that there is a clear and present danger to the administration of justice, no court can bind a lawyer or his client * * * from making extra-judicial statements.

Mr. Kunstler cited Chase v. Robson, 435 F. 2d 1059 (7th Cir. 1970), and pressed that decision as being the law of the land.

Judge Reda, at the conclusion of this colloquy, refused to "change [the Court's] opinion in this matter." He offered no reason, merely stating that "there is nothing new that has been presented to the Court." Thereafter, Professor Ross reiterated his belief that the trial was a political persecution, not a bona fide prosecution. He therefore felt he required the specialized services of Mr. Kunstler. For the expressed purpose of preserving this issue, petitioner dismissed local counsel and announced he would stand mute through the trial.

That afternoon, a jury was selected. The following morning the jury heard the State's uncontested evidence. Petitioner stood mute throughout. 6/ After four hours of deliberation, the jury returned a guilty verdict on all charges. The instant petition attacks the underlying conviction and the unserved portion of a 30-day sentence to the workhouse. 7/

On direct appeal, petitioner urged inter alia that Judge Reda had a duty to rule de novo on all issues. He further argued that there was no factual substantiation for Judge Fais' findings as to Mr. Kunstler's alleged improper conduct

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6/ The Sixth Circuit misleadingly states that petitioner "present[ed] his own case." To the contrary, petitioner offered no evidence, refused to examine adverse witnesses, and made no argument. Whenever addressed by Judge Reda, he repeated his assertion that he would not and could not represent himself.

7/ Petitioner's order to report for confinement ripened just after notice of appeal to the Sixth Circuit was filed. When petitioner reported, he was accompanied by Mr. Twohig's clerk. The clerk attempted to serve Judge Reda and police officers with notice that appeal was pending, together with a copy of Federal Rules of Appellate Procedure 23(a), which prohibits transfer of custody absent permission of the federal court. Judge Reda refused to accept personal service and ordered that petitioner be confined. Six days later the Sixth Circuit ordered petitioner's release pending final disposition of the case.

and since Judge Reda made no factual finding of his own, he either adopted Judge Fais' findings or if not, was arrogating to himself unfettered discretion to deny an application for pro hac vice admission. 8/

The Franklin County Court of Appeals rejected the assigned error that all of Judge Reda's rulings were tainted by reason of bias of Judge Fais on the alternative grounds that Judge Reda had ruled independently and that the brief failed to preserve error in any particular tainted ruling, except for two rulings discussed in separate assignments of error.

One of the "preserved" rulings was the exclusion of Mr. Kunstler. The State appellate court admitted that there was no support in the record for the findings upon which Judge Fais based his ruling. The Court could point to no finding by Judge Reda which invoked a rationale different from that erroneously offered by Judge Fais. Nonetheless, the ruling excluding Mr. Kunstler was affirmed by the appellate court's substituting its own

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8/ During the trial on the merits, Judge Reda reverted to the view originally held by Judge Fais, declaring that "the Court has the discretion in these matters on non-resident attorneys, and the Court exercised its discretion unfavorably to Mr. Kunstler." In reality, the Court's action was unfavorable to petitioner. Petitioner's rights -- not Mr. Kunstler's -- were in issue.

rationale for that of the trial court. Alluding to the colloquy between Judge Reda and Mr. Kunstler described above, the Franklin County Court of Appeals held that Canon 7 of the Code of Professional Responsibility as adopted by Ohio's Supreme Court is the controlling rule in State courts despite the holding of Chase v. Robson, supra, and that the trial court "was justified in concluding" that Mr. Kunstler "would not [in futuro] comply with the standards established by Canon 7" (p. 32 a), and accordingly, pro hac vice admission was properly denied.

In fact, Judge Reda had made no such conclusion; indeed he never even mentioned Canon 7. Moreover Judge Reda never suggested that the rule of Chase is either incorrect or inapplicable to the Ross case. To the contrary, Judge Reda had dismissed Mr. Kunstler's opinion as inconsequential, "nothing new." And at no time did Judge Reda advise Mr. Kunstler that he rejected Chase and would insist on compliance with Canon 7 by any attorney admitted pro hac vice. 9/

9/ The source of the appellate court's statement that the trial court "was justified in concluding"that Mr. Kunstler "would not comply with the standards established by Canon 7"is nowhere stated. Mr. Kunstler did state in the course of the colloquy, "I would never promise Your Honor that I would not speak outside" but it is clear from the context that Mr. Kunstler was referring at that time to the rule of Chase v. Robson and the requirement that there be a specific finding and a direc-

footnote continued on next page.

On habeas corpus, the United States District Court recognized that the rationale of the Franklin County Court of Appeals was created post hoc. It found that the record as to Mr. Kunstler's alleged intention "not [to] comply" in futuro with Canon 7 "is susceptible of a contrary interpretation." (34a) 10/ But the District Court held itself without power to pierce through the State appellate court's fact-finding legerdemain, citing 28 U.S.C. §2254(d).

9/ footnote continued from previous page.

tion by the Court in order to sustain a gag rule upon attorneys. Indeed, Mr. Kunstler in the course of his colloquy, and after mentioning the procedures of Chase, said that if the court made certain findings "then I would submit Your Honor would have a right to take this very action [prohibiting extra judicial statements] if that happens."

For reasons not stated, both the Ohio appellate court and the District Court omitted the foregoing from their quotation of Mr. Kunstler's statement. This portion of Mr. Kunstler's statement appears a short space beyond that quoted by both courts.

10/ This is an unusually deferential way of stating that there was in fact no mention of Canon 7 during the entire colloquy, nor was there any statement by Mr. Kunstler of an intention to violate the Canon.

Some explanation for this formulation by the Court may be found in the District Court's plainly erroneous statement that Mr. Kunstler had said "that the Court did not have power to prohibit him from speaking outside the courtroom." Mr. Kunstler stated exactly the contrary as pointed out in fn.9.(28a)

The Sixth Circuit affirmed in a short per curiam, expressing the view that the State could deny a pro hac vice admission because of a "potential violation of Canon 7 of the Ohio Canons of Ethics" (emphasis added)(p. 13a). The Sixth Circuit did not address the fact that the trial court never premised its actions on the findings of the State appellate court, nor did it deal with the fact that the Municipal Court never so much as mentioned Canon 7 and that it expected compliance therewith without the procedure and limitations prescribed by Chase v. Robson. As to whether Judge Reda was required to make an "independent investigation" of the issues, it simply stated that it was satisfied that the substituted judge "reviewed" the prior rulings and determined them to be correct.

REASONS FOR GRANTING THE WRIT

I

THE PETITION PRESENTS FOR REVIEW AN IMPORTANT CONSTITUTIONAL QUESTION NOT HERETOFORE DETERMINED BY THIS COURT AS TO WHICH THERE IS A CLEAR CONFLICT AMONG THE CIRCUITS -- NAMELY THE SCOPE OF A COURT'S POWER TO REFUSE PRO HAC VICE ADMISSION TO OUT-OF-STATE COUNSEL IN GOOD STANDING WHERE THE EFFECT ON SUCH REFUSAL IS TO DENY TO AN ACCUSED IN A CRIMINAL TRIAL THE RIGHT TO RETAINED DEFENSE COUNSEL OF HIS CHOICE.

The Sixth Amendment right to counsel is one of the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," Powell v. Alabama, 287 U.S. 45, 67 (1932); Hamilton v. Alabama, 368 U.S. 52 (1961); Gideon v. Wainwright, 372 U.S. 335 (1963); White v. Maryland, 373 U.S. 59 (1963); United States v. Wade, 388 U.S. 218 (1967); Argersinger v. Hamlin, 407 U.S. 25 (1972); United States v. Ash, 413 U.S. 300 (1973); Faretta v. California, ___U.S.___, 43 L.W. 5004 (June 30,1975).

"It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice," Powell, supra, 287 U.S. at 53 (emphasis added). Accord, Glasser v. United States, 315 U.S. 60, 70 (1942); In re Groban, 352 U.S. 330, 332 (1957).

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In Chandler v. Fretag, 348 U.S. 3, 9 (1954), this Court stated firmly that a defendant's right "to be heard through his own counsel was unqualified." See also Reynolds v. Cochran, 365 U.S. 525, 530-31 (1961). See generally, W. Beaney, The Right to Counsel in American Courts, 190 (1955); cf. Cheatham, The Reach of Federal Action Over the Profession of Law, 18 Stan. L. Rev. 1288, 1293. State v. Agresta,5 Conn.Cir.242,250 A.2d 345 (1968)11/

11/ There are a few recognized limitations. A defendant seeking to have court appointed counsel does not have a right to dictate the appointment. United States v. White, 451 F. 2d 1225 (6th Cir. 197-); Reiff v. United States, 299 F. 2d 366 (9th Cir. 1962); cert. den. 372 U.S. 937 (1963); Kruchten v. Eyman, 276 F. Supp. 858, 859 (D.C. Ariz. 1967), aff'd 406 F. 2d 304 (9th Cir. 1969), mod. on other grounds, 408 U.S. 934 (1972); United States v. Davis, 365 F. 2d 251 (6th Cir. 1966). But even here it has become the growing practice of courts to appoint counsel requested by an indigent defendant if counsel is willing.

Also, where the defendant seeks to change his choice of counsel immediately before a trial, or delays choosing counsel until immediately prior to trial, a court need not permit such delays to interfere with the smooth working of its calendar. United States v. McMann, 386 F. 2d 611 (2nd Cir. 1967); Lee v. United States, 235 F. 2d 219 (D.C. Cir. 1956); Faretta v. California, supra. But even in those situations, the court will be

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On the matter of pro hac vice admission -- where such a course is sought so that a defendant may have counsel of his own choice -- there appears to be confusion in the courts. In the federal judicial system, admission pro hac vice of counsel from another jurisdiction has been stated to be a matter of absolute constitutional right. United States v. Bergamo, 154 F. 2d 31, 35 (3rd Cir. 1946), even in civil litigation, Spanos v. Skouras Theatres Corp. 364 F. 2d 161 (2nd Cir. 1966), cert. den. 385 U.S. 987.

In the State judicial systems there are occasional references suggesting that inter-state pro hac admission is a matter of "grace" (as suggested by Judge Fais in this case). Cooper v. Hutchinson, 184 F. 2d 119, 192 (3rd Cir. 1950); In re Pierce, 189 Wisc. 441, 207 N.W. 966, 970 (S. Ct. Wisc. 1926); Thomas v. Cassidy, 249 F. 2d 91 (4th Cir. 1957), cert.den. 355 U.S. 958 (1958); People of the State of New York v. Epton, 248 F. Supp. 276, 277 (S.D.N.Y. 1965). Other courts state that such an admission may not be arbitrarily denied. See Cooper v. Hutchinson, supra at 122 and the District Court's opinion in this case (34a) citing Magee v. Superior Court, 8 Cal. 3d 949, 954

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very slow to override defendant's efforts to obtain counsel of his own choice. United States v. McMann, supra at 618-19; United States ex rel. Carey v. Rundle, 409 F. 2d 1210, 1214-15 (3rd Cir. 1969). Especially is this so in an "unpopular" case having "First Amendment overtones," United States v. Mitchell, 354F.2d 767 (2nd Cir. 1966).

(Calif. S. Ct. 1973) and Banks v. Holder, printed at 71 a. (7th Cir. 1973)(unpub.)

The Sixth Circuit's opinion in this case exemplifies the confusion on the issue. The Circuit quotes from Cassidy, supra to the effect that pro hac vice admission is "not a right but a privilege . . . which is a matter of grace resting in the sound discretion of the judge." Three paragraphs later the Sixth Circuit says, "the prerogative of a trial judge to exclude out-of-state counsel. . . is not an absolute right." (510 F. 2d 1172,1173, p. 12a.)

We submit that limitation upon a state criminal defendant's choice of counsel can only be constitutionally justified by demonstrating that the state has a valid and compelling reason for interfering with this most fundamental of rights. Where the limitation takes the form of denying pro hac vice representation by an attorney in good standing with his home bar, that denial must be predicated upon a procedurally proper and substantively necessary exercise of the State's police powers, in furtherance of a legitimate and commanding interest of the State. See generally, Morris, State Borders Unnecessary Barriers to Effective Law Practice, 53 ABA J. 530. Note, F. Lee Bailey, Won't You Come Home--The Pro Hac Vice Blues, 1969 Utah L. Rev. 227, Constitutional Right to Engage an Out-of-State Attorney, 19 Stan. L. Rev. 856 (1967); The Practice of Law by Out-of-State Attorneys, 20 Vand. L.Rev. 1276 (1967).

The interests which the State seeks to protect in granting or denying pro hac vice appearance by out-of-state coun-

sel are no different from those which are properly protected through permanent certification and disciplinary procedures of in-state attorneys, both of which are governed by procedural and substantive due process requirements. Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); In re Ruffalo, 390 U.S. 544 (1968). These interests are the protection of the public from incompetent or unscrupulous practioners. 12/ Because an out-of-state attorney has not demonstrated his familiarity with the law of the forum, he may be required to associate himself with an in-state attorney. But even this requirement cannot be enforced if the local bar is unwilling or unable to act as local counsel. See Lefton v. City of Hattiesburg, Miss., 333 F. 2d 280 (5th Cir. 1964). See also Sanders v. Russell, 401 F. 2d 241 (5th Cir. 1968). Additionally, a state might reasonably deny pro hac vice admission to an attorney whose

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12/ The State's arguable interest in protecting the economic welfare of the practitioner is, of course, met by the requirement of the concurrant appearance of local counsel, or making certain that the pro hac vice denial is not overused by a particular lawyer so that he is in effect holding himself out to the State's population as a fully admitted attorney. See Brown v. Woods, ___Ark. ___, 516 S.W. 2d 98 (1974, dissent), cert. den. 95 S. Ct. 1951 (1975). In any event, economic considerations are wholly unrelated to the issues in this case.

home state applied so dramatically attenuated a standard of general competency and honesty as to suggest that the attorney could not have gained permanent admission in the forum states. Finally, a state may reasonably require proof that an out-of-state attorney is currently in good standing with his home bar.

When the State imposes greater limitations on pro hac vice appearances, it is not merely acting arbitrarily and capriciously; it impairs the right to counsel. Today, the most capable practitioners specialize in relatively narrow, and even esoteric, areas of the law, and the itinerant attorney has become all but commonplace in every state's courtrooms. Every state routinely gives full faith and credit to a sister state's ascertainment of professional competency and character, for purposes of permitting an appearance pro hac vice in association with local counsel. Ohio makes no claim that its courts regularly act differently from the traditions prevailing in the 49 sister states. Its claim in this case, at bottom, is a non-existent right to exclude a criminal defendant's personally retained attorney from the state's courtrooms, not for his acts of commissions or omission, but for his reputation as an outspoken attorney who specializes in precisely the type of case where local counsel are frequently ineffective. For in a case with "First Amendment overtones, it is always difficult to obtain counsel to defend an unpopular cause . . ." United States v. Michell, supra.

The State's interest in having the power to discipline a licensed attorney who thereafter falls below the minimally accepted standards is fully protected by a pro hac vice admission. Firstly, by the process of pro hac vice admission he subjects himself to the disciplinary process of the forum. Moreover, every state is willing and able to process disciplinary grievances entered against its fully licensed attorneys, whether the grievance arose in-state or out-of-state. An attorney's professional responsibilities do not end at his home state's borders.

The rulings below plainly visit upon an unpopular accused the uncommitted sins of his chosen trial counsel. 13/ In excluding Mr. Kunstler from participation in the trial, the state impaired the accused's constitutional right to counsel of his choice in the total absence of good, let alone compelling, cause. The victim was not counsel, but the client!

13/ It is not for the courts to second-guess an accused as to his need for the services of a given attorney. Particularly is this so where there has been an established lawyer-client relationship, as is here the case. Mr. Kunstler had appeared in two prior proceedings on behalf of Professor Ross, both related to the events underlying the instant case. Although the State appellate court and the Sixth Circuit make much of Professor Ross's refusal to accept the continued services of his retained local counsel, they fail to appreciate that acceptance of their unspecialized services at trial

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In Powell v. Alabama, supra this Court stated:

> If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel employed and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing and, therefore, of due process in the constitutional sense.

This petition presents the Court with such a case.

Recently the Seventh Circuit dealt directly with the conflict between the defendant's claim to counsel of his choice and the asserted right of a local judge to deny pro hac vice admissions. In Banks v. Holder, Oct. 1, 1973, (unreported, but printed in Appendix hereto at p. 72a) that Court concluded:

> "before a trial court may properly limit the defendant's right to a chosen counsel, there must be sufficiently supported and specific findings of fact that the conduct of the defendant's attorney creates a serious and imminent

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would undoubtedly have been construed as a waiver of petitioner's claim to the services of Mr. Kunstler, or, alternatively, would have invited a finding of harmless error. Cf. Murphy v. Florida, ___U.S.___, 43 L.W. 4730 (June 16, 1975).

threat of 'significant prejudice to the defendant himself' or of 'disruption of the orderly process of justice unreasonable under the circumstance of the particular case.' Magee v. Superior Court of City and County of San Francisco, 8 Cal. 2nd 949, 506 P. 2d 1023 (1973)."

This Court accepted a petition for writ of certiorari to review the foregoing decision. But after briefs were submitted and oral argument was had, the petition was dismissed as having been improvidently granted. 417 U.S. 187(1974).

The standards employed by the Sixth Circuit in this case are plainly in conflict with those of the Seventh Circuit in Banks. 14/

The question is whether a court considering a request for pro hac vice admission must grant the same unless there be "sufficiently supported and specific findings of fact . . .[of] a serious and imminent threat of'significant prejudice to the defendant himself' or of 'disruption of the orderly process of justice. . .'" (Banks, supra at p.72 a.) as specified by the Seventh Circuit or whether as indicated by the Sixth Circuit in this case, almost any statement,how-

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14/ We recognize, of course, that Banks arose in the context of the federal judicial system and the instant case arises out of the state judicial system, but the right to counsel is one which has the same constitutional value in both judicial systems. Gideon v. Wainwright, 372 U.S. 335 (1963).

ever unsupported by the record will sustain a denial of a pro hac vice admission on the theory that, though a trial judge may not have "an absolute right" to exclude out-of-state counsel, the entire matter is one of "grace resting in the sound discretion of the judge."

The case is presented to the Court in the posture of a clear conflict between at least the Sixth and the Seventh Circuits as to the constitutional standards for pro hac vice admission. It would also appear that the Second and Third Circuits have a view in accord with the Seventh (Spanos v. Skouras Theatres Corp., supra; United States v. Bergamo, supra, but the Fourth Circuit seems to go in the direction of the Sixth (Thomas v. Cassidy, supra. In the face of this conflict, guidance by this Court is a compelling necessity in an area where there is a grave threat to a major constitutional right -- the right to counsel.

II

THE PETITION PRESENTS FOR REVIEW AN IMPORTANT CONSTITUTIONAL QUESTION NOT HERETOFORE DETERMINED BY THIS COURT AS TO WHICH THERE IS CLEAR CONFLICT BETWEEN THE SIXTH AND SEVENTH CIRCUITS -- NAMELY, THE SCOPE OF A COURT'S POWER TO LIMIT EXTRA JUDICIAL COMMENT BY AN ATTORNEY BY A GENERAL RULE WITHOUT A FINDING OF NECESSITY IN A PARTICULAR CASE AND WITHOUT A SHOWING THAT THE ADMINISTRATION OF JUSTICE OR A FAIR TRIAL IS THREATENED.

There is nothing in the record of this case -- and the Ohio appellate court so stated -- to show that Mr. Kunstler had made improper extra-judicial statements. The exclusion of Mr. Kunstler was sustained by the Ohio appellate court and in turn by the Sixth Circuit, exclusively on the grounds that he stated that in his view, Chase v. Robson, supra was the governing law, coupled with the conclusion of the Ohio appellate court that the trial court could have concluded that Mr. Kunstler would not comply with Canon 7 or the Ohio Code of Professional Responsibility.15/

While the Sixth Circuit does not mention or cite Chase v. Robson, supra, its decision implicitly accepts the validity of Canon 7 of the Code of Professional Responsibility which even the

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15/ We repeat that the trial court made no such conclusion and at no time indicated to Mr. Kunstler that it expected compliance with Canon 7, regardless of Chase v. Robson, supra.

Ohio appellate court recognized to be inconsistent with "the guidelines of Chase." (51a.) Thus there is a conflict between the Sixth and Seventh Circuits upon an issue which has developed throughout the federal and state judicial systems and as to which there is no guidance from this Court.

Building on dictum in Sheppard v. Maxwell, 384 U.S. 333 (1966), courts throughout the nation have adopted rules governing extra-judicial statements by attorneys. These rules followed reports of the Reardon Committee of the American Bar Association 16/ and the Kaufman Committee 17/. But except for the decision by the Seventh Circuit in Chase, there has been no articulated analysis of the serious First Amendment questions which these restrictions involve, such as:

a) Does a blanket rule prohibiting all extra judicial statements in pending cases violate the requirement that no First Amendment limitation may be imposed without a compelling reason, Cohen v. California, 403 U.S. 15, 26 (1971). When such a

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16/ Standards relating to Fair Trial and Free Press.

17/ Report of the Committee of the Operation of the Jury System on the Free Press - Fair Trial Issue, 45 F.R.D. 391.

restriction is imposed it must not be "overbroad", Gooding v. Wilson, 405 U.S. 518 (1972), and it must be demonstrated "that no alternative forms of regulation would combat [the danger] without infringing First Amendment rights." Sherbert v. Verner, 374 U.S. 398, 407 (1963); Shelton v. Tucker, 364 U.S. 479 (1960)?

b) Do not the foregoing principles prohibit application of a rule prescribing a lawyer's extra-judicial statements until there has been a finding in the particular case that such a proscription is necessary and justified upon some acceptable constitutional standard which defines a serious and imminent threat to the administration of justice? This is the standard employed by the court as to non-lawyers, Bridges v. California, 314 U.S. 252 (1941); Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946); Wood v. Georgia, 370 U.S. 375 (1962). Does the status of being a lawyer remove one from the penumbra of these constitutional limitations despite this Court's ruling in In Re Sawyer, 360 U.S. 662 (1959) emphasizing that the only basis for restricting lawyers' speech was a showing of actual obstruction of the administration of justice?

c) Given a court's power upon a showing of necessity to fashion a "gag" order to curb statements which might prejudice a trial in a particular case, is not such a procedure (with attendant due process) the only way to avoid overbroad and unnecessary restrictions on speech? The Kaufman Committee expressly noted this alternate procedure. See 45 F.R.D. 409.

These are the questions addressed by the Seventh Circuit in Chase, but completely ignored yet sub silentio rejected by the Sixth Circuit in this case.

Since there now exists a clear conflict between the Sixth and Seventh Circuits upon the implementation of this Court's dictum in Sheppard v. Maxwell, supra, it is appropriate that the Court grant this petition and give appropriate guidelines to lower courts.

III.

THE PETITION PRESENTS FOR REVIEW AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW DECIDED BY THE CIRCUIT COURT IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT -- NAMELY WHETHER A CONVICTION MAY BE SUSTAINED BY AN APPELLATE COURT UPON GROUNDS DIFFERENT FROM THOSE STATED BY THE TRIAL COURT WHERE THE DEFENDANT'S TRIAL STRATEGY WAS GOVERNED BY THE ACTIONS OF THE TRIAL COURT.

Petitioner was denied pro hac vice representation by his chosen counsel, Mr. Kunstler, upon a finding by Judge Fais that counsel had engaged in prior misconduct. The successor trial judge adhered to Judge Fais' ruling without making further findings, in the face of local counsel's demonstration that the record would not support a finding of past misconduct. The only state appellate court to consider the merits specifically held that the record would not support a finding of prior

misconduct. 18/

The appellate court affirmed petitioner's conviction by independently searching the record for an alternative basis upon which chosen counsel could - might theoretically - have been excluded. It purported to find such a basis by seizing upon Mr. Kunstler's stated opinion that the rule of Chase v. Robson properly declared the limitations which the First Amendment imposes upon judicial control of an attorney's out-of-court statements. The trial court considered Mr. Kunstler's stated opinion to be irrelevant to the merits of his pro hac vice representation of petitioner; it was "nothing new." But the state appellate court deemed it dispositive.

To do so, the Franklin County Court of Appeals first held that Chase applies only to the federal judicial system and could not reach state courts. It next held that the controlling Ohio rule stated a more restrictive standard than that announced in Chase, but was not repugnant to the Constitution. Finally, it held that Mr. Kunstler's professional opinion demonstrated that he would subsequently violate the Ohio rule, and therefore, he was ineligible to appear pro hac vice in an Ohio court.

18/ The state appellate court recognized that every aspect of trial on the merits was substantially altered by Mr. Kunstler's exclusion. Petitioner had to stand mute as the only certain means of preserving his claim that the ruling excluding participation by his chosen chief counsel was erroneous. Cf. Murphy v. Florida, supra.

To obviate the impact of Cole v. Arkansas, 333 U.S. 196 (1949), on its post hoc invention of a supposedly adequate basis in the record for denying petitioner the specialized services of his chosen chief counsel, the state appellate court, without any foundation whatever, attributed its own findings to the trial judge.19/ The district court acknowledged this and specifically found that "the Court of Appeals for Franklin County, Ohio, based its decision upon two grounds not expressly stated by either Judge Fais or Judge Reda." But the district court failed to appreciate the due process implications of this finding, and the Sixth Circuit failed to address them.

In Cole v. Arkansas, supra, this Court held it "a violation of due process for the appellate court to appraise and affirm petitioners' convictions on considerations other than those governing the case as it was tried and as the issues were determined in the trial court." 333 U.S. at 347, n. 1 (emphasis added).

19/ The opinion states: "From Mr. Kunstler's statement, the trial court was justified in concluding that Mr. Kunstler would not comply with the standards established by Canon 7 . . ." (51 a) (emphasis supplied). Assuming without conceding that the trial court might have been justified in so concluding, the trial record is unambiguous; no such conclusion was made. Cf. Eaton v. City of Tulsa, 415 U.S. 697, 698-699 (1974).

The denial of due process in this case is obvious. When petitioner decided to stand mute he had a right to rely upon what he heard the court say: namely that his chosen lawyer would be excluded because he had misconducted himself. Knowing that the court was wrong, petitioner stood mute, confident that he would be sustained in his position. 20/ Indeed, he was sustained; the appellate court confirmed that there was no record of his lawyer having misconducted himself.

The appellate court in fashioning a new theory effectively denied petitioner due process, because had he timely knowledge of the new theory both he and his lawyer might have acted quite differently.

a) If Mr. Kunstler had been told that his statement was being interpreted as an

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20/ Emphasizing that defendants may not react to bad rulings except by abiding with them and appealing, the Seventh Circuit in United States v. Seale, 461 F.2d 345, 363 (1972) said:

> it is precisely because appellate courts sit to vindicate error that this principle is viable.

Similarly, Judge Augustus Hand, speaking for the court in United States v. Sacher, 182 F.2d 416, 430 (2d Cir., 1950), aff'd. 343 U.S. 1 (1952) said re aggrieved defendants, "their only remedy is by appeal." If an appellate court can switch theory in order to affirm a decision, then the protection which the appellate process should afford is vitiated.

assertion that he would violate Canon 7, and that the trial court rejected Chase v. Robson, Mr. Kunstler might have made clear that he would abide by Canon 7;

b) More critically, if petitioner had been told that he could not have the lawyer of his choice for the reason that his lawyer would not accept Canon 7, he might have sought to persuade Mr. Kunstler to alter his position, and if unsuccessful he might not have stood mute.

Time and time again, in a multitude of contexts, this Court has refused to countenance an appellate tribunal's imposition of its own views as to the salient issues and evidence, or of the proper exercise of discretion, where the court or agency of original jurisdiction premised its action on an erroneous view of the law.

In Clay v. United States, 403 U.S. 698 (1971) (per curiam), this Court held that a Selective Service registrant could not be criminally punished for relying on his belief that the critical administrative determination was erroneous, notwithstanding the Solicitor General's insistence that the appeal board might have acted on legally adequate grounds. It not being clear that the board relied on some legitimate ground, a reviewing court could neither second-guess the appeal board nor would it second-guess the registrant, who had acted in reliance upon the perceived impropriety of the appeal board's determination. Here, the state appellate court second-guessed the trial court petitioner, and petitioner's attorney. See also Lanzetta v. New Jersey, 306 U.S. 451 (1939);

Brinkerhoff-Faris T. and S. Co. v. Hill, 281 U.S. 673 (1930); Rabe v. Washington, 405 U.S. 313, 315 (1972).

Most recently, in Eaton v. City of Tulsa, supra, this Court per curiam held that "the question is not upon what evidence the trial judge could find petitioner guilty but upon what evidence the trial judge did find petitioner guilty." 415 U.S. at 698 (emphasis in original). Although Eaton was concerned with the premises upon which petitioner was convicted of contempt of court, and the instant case is concerned with the premises upon which petitioner was denied the assistance of his chosen counsel, the distinction reflects no underlying difference. In both cases, a state appellate court sustained a conviction by construing a record in a manner at variance with the theory upon which the critical issue initially was examined and decided. In both cases, the critical issue was dispositive of all other issues.

Here, as in Eaton, the trial court "at least owe[d] the party concerned some sort of notice or warning." 415 U.S. at 701, Powell, J., concurring. In Eaton, such notice would have related to whether petitioner should stand mute. In both cases, as in Cole, supra, the state appellate court could not properly affirm except on the basis of the considerations which governed as each case was tried and as the issues were determined in the trial court. See also, Gregory v. City of Chicago, 394 U.S. 111 (1969); Bouie v. Columbia, 378 U.S. 347 (1964); cf. Cohen v. California, supra; Garner v. Louisiana, 368 U.S. 157 (1961).

Where, as here, it was unforeseeable that the trial court's concededly erroneous ruling, upon which turned the whole defense strategy at the trial, would subsequently be cured by appellate adoption of a new theory, 21/ the due process clause commands that petitioner's conviction be reversed. Since the case involves a failure of the circuit court to apply to a new situation principles enunciated by this Court in Cole, Eaton and other cases, the Court should grant this petition so as to assure the uniform application of the due process standards there set forth.

20/ For substantially the same reasons, petitioner's abandonment of his right to counsel was not made "knowingly and intelligently," Johnson v. Zerbst, 304 U.S. 458-, 464-65 (1938), because it was not a free choice "made with eyes open." Adams v. United States ex rel. McCann, 317 U.S. 269, 270 (1942). See Faretta, supra, 43 L.W. at 5013; cf. Argersinger v. Hamlin, 407 U.S. 25 (1972).

IV.

THE CASE PRESENTS FOR REVIEW AN IMPORTANT FEDERAL QUESTION NOT HERETOFORE DETERMINED BY THIS COURT, NAMELY WHETHER AS A MATTER OF DUE PROCESS OF LAW, A JUDGE SUBSTITUTED FOR ANOTHER WHO HAS BEEN DISQUALIFIED FOR PREJUDICE IS REQUIRED TO CONSIDER DE NOVO ALL RULINGS OF HIS PREDECESSOR MADE AFTER AN AFFIDAVIT OF PREJUDICE WAS FILED.

Early on the morning of April 6, 1972, petitioner duly filed and served his affidavit of prejudice against Chief Judge Fais. The affidavit set forth numerous instances in which the judge had manifested open hostility toward petitioner's local and out-of-state counsel. Although it is clear under Ohio law that no further proceedings may be held during the pendency of a motion to disqualify, Moore v. State, 118 Ohio St. 487, 490 (1928), Judge Fais rendered adverse written opinions on numerous pre-trial motions after being served with recusal papers. In every instance he ruled against petitioners. 22/

22/ The pre-trial motions decided by Judge Fais after the filing of the affidavit of prejudice included an attack upon the jury rolls on the ground that black and young persons were systematically excluded; motion to dismiss due to selective arrest of petitioner on the basis of race; motion for bill of particulars; motion for discovery; motion for individual voir dire of prospective jurors; motion to suppress evidence and to dismiss due to electronic surveillance; motion for reassignment of a judge by lot; and the motion relating to Mr. Kunstler's admission pro hac vice.

In its opinion disqualifying Judge Fais, the Ohio appellate court expressly referred to the possibility of taint of these rulings. The Court said:

> "Through various statements and allegations, both in court and outside the court, it would appear that Judge Fais has been goaded into making statements which, combined with his rulings on said motions might be construed as bias on his part against either the defendant or his attorneys." 69a.
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> (emphasis supplied)

It is, of course, fundamental that a biased judge is barred by due process from sitting in a criminal case. Tumey v. Ohio, 273 U.S. 510 (1927). The fairness of a tribunal depends heavily on the judge that presides. Not only is it the actual bias of a judge which violates due process, but even the appearance of bias is intolerable. Ward v. City of Monroeville, 409 U.S. 57 (1972). The question then is what is the responsibility of a judge who replaces one who, after entering contested rulings, has been disqualified for bias and prejudice.

It would seem to be fundamental that the replacing judge must independently determine at least those rulings made after the claim of prejudice was asserted.

At common law, a completed act of a disqualified judge is void where the reason for his disqualification is bias and prejudice. 49 C.J.S. Judgments Section 17; Marks v. Smith, 60 S.E. 1016 (Ga. App.1908).

In Ward v. City of Monroeville, supra, this Court held that the mere appearance of bias--which the Ohio court found in Judge Fais --voids the ensuing judgment notwithstanding the right to a trial de novo because a defendant "is entitled to a neutral and detached judge in the first instance." 409 U.S. at 61-62. Here,in the absence of a trial de novo, petitioner properly demanded that all rulings be made in the first instance by an impartial judge.

The record is clear that Judge Reda did not make a wholly independent determination of the issues. By his own admission, Judge Reda deferred to Judge Fais' discretionary rulings.

On the afternoon of Thursday, July 6, 1972, immediately upon his assignment to this case, Judge Reda held a preliminary hearing, at which petitioner requested that all issues reached by Chief Municipal Judge Fais be considered de novo. Judge Reda's instant reaction was negative:

> You are asking that this Court review the decision by the Chief Justice of this Court on these motions?

To which counsel replied, "I'm asking that the Court * * * consider these motions anew as if they have never been considered * * * The decisions on those motions * * * were rendered after an affidavit of prejudice had been filed." Counsel continued by noting that the papers in the case were voluminous; at least nine motions had been fully briefed. Additionally, although Judge Fais had refused to receive any evidence on the motions, he had heard oral argument on not less than

three occasions. Transcripts were not in all instances immediately available.

Judge Reda adjourned the hearing to the following morning. At that time, he announced that overnight, he had read all of the moving papers, supporting and opposing briefs. He further declared that he would not "disturb" any of Judge Fais' decisions.

On the day of the trial, the defense requested that Judge Reda clarify his refusal to "disturb" Judge Fais' rulings. He was specifically requested to indicate whether he deemed Judge Fais' rulings "valid," or deemed them void, but had "ruled independently and anew on each of these motions."

Judge Reda evaded the question. On matters of substantive law, he "did not find any error" in Judge Fais' rulings. As to discretionary matters, including but not limited to"whether or not Mr. Kunstler would be permitted to serve as co-counsel," he "concurred with Judge Fais."

Mr. Twohig thereupon reframed the question:

> What would Your Honor's rulings be were that not what Judge Fais had decided?

Judge Reda then gave his closest approach to a direct answer:

> I feel this, that Judge Fais' decisions were not made under the stigma of prejudice, which would

> warrant, which would demand that some other judge completely review the whole matter.23/

In other words, Judge Reda did not rule de novo.

On appeal, petitioner assigned as error the failure to treat as absolutely void decisions made by a judge against whom a timely and sufficient affidavit of prejudice had previously been filed.

First, it declared that "[t]he record is clear that Judge Reda reviewed all of the various motions filed by defendant, and ruled thereon." 24/ (p. 59 a)

23/ Judge Reda obviously misread the decision of a superior court which specifically stated that Judge Fais' statements "combined with his rulings on said motions might be construed as bias on his part." The Court of Common Pleas never reached the question of actual bias, but Judge Reda insisted that no bias, only the appearance of bias, had been found.

24/ As to this, there is no dispute. The issue is not that he failed to review, but rather that he applied the wrong reviewing standard -- a standard which might be appropriate for an appellate court but not for a trial judge with a duty to remove all taint of prejudice.

The Court further found that Judge Reda "clearly indicated that he exercised his own independent discretion." (p. 60a) As the preceding transcript excerpts demonstrate, nothing could be further from reality.

In the alternative, the Franklin County Court of Appeals found that any failure to fully reconsider was harmless error. This finding was premised on the failure to appeal from any particular ruling except the one excluding Mr. Kunstler from participating in the trial.

No prior case suggests that void rulings in a criminal proceeding, if timely challenged, must be shown to be erroneous or to entail an abuse of discretion. Cf. Ward v. City of Monroeville, supra. The question raised on appeal was jurisdictional: Did Judge Reda commit jurisdictional error in deferring to Judge Fais' biased rulings? The answer to the question was dispositive of such crucial matters as the denial of a bill of particulars and the foreclosure of any challenge to the jury selection procedures, as well as the choice of counsel issue. But the answer given by the reviewing courts never addressed the fundamental issue: was the fatal taint of bias, in fact, perpetuated? By Judge Reda's admission, it was.

The United States District Court in considering the issue considered itself bound under 28 U.S.C. §2254(d), by the findings of the Court of Appeals of Franklin County (see Point V. infra.) and repeated the findings of that court. The

Court of Appeals for the Sixth Circuit said:

> "Our examination of the record convinces us that the substituted judge did in fact review the prior rulings and upheld them only after he determined they were correct."(13a)

But as pointed out above, the issue is not one of "review" but of untainted de novo determination. Accordingly, petitioner has been denied due process of law, in contravention of the Fourteenth Amendment, because his conviction reflects the full force and effect of rulings entered by a judge who was biased and acted beyond his authority.

This issue merits consideration by this Court because no decision by this Court deals with the application of the Due Process principles of Tumey and Ward to the situation where a judge has been replaced for reasons of prejudice.

V.

THE PETITION PRESENTS FOR REVIEW AN IMPORTANT FEDERAL QUESTION NOT HERETOFORE DETERMINED BY THIS COURT, NAMELY WHETHER A FEDERAL COURT ON HABEAS CORPUS IS BOUND BY "FACT" FINDINGS DERIVED FROM THE COLD TRANSCRIPT BY A STATE APPELLATE COURT WHICH SUPERCEDED ERRONEOUS FINDINGS BY THE STATE TRIAL COURT, WHERE THE POWER OF THE STATE APPELLATE COURT DOES NOT EXTEND TO FACT FINDING.

As with the two immediately preceding questions, the question here presented is unrelated to the merits of petitioner's claim of entitlement to representation by Mr. Kunstler. This question is instead concerned with the role of a federal habeas court when reviewing a state criminal conviction. Specifially, it addresses the types of state findings of fact which are precluded by §2254(d) from redertermination by the federal court. This question arises with respect to two determinations as to which the federal habeas court felt bound by "factual" determinations of the state appellate court:

a) whether Mr. Kunstler's statement could be read as a refusal under any circumstances to abide by Canon 7;

b) whether Judge Reda made an independent determination of the issues previously determined by Judge Fais.

Title 28, United States Code, §2254 is a legislative device designed to minimize the frictions generated by our constitutional commitment to a federal system

in which each state retains partial sovereignty, but in which the federal courts are charged with an independent responsibility to protect individuals from deprivations of federally protected rights by the state courts.

Subsection (d) of Section 2254 is substantially a codification of the constitutional principles enunciated by this Court in Townsend v. Sain, 372 U.S. 293, 312-319 (1963). It plainly does not bind the District Court to accept findings which are made by a court which lacked jurisdiction to make the same(sub-section 2254(d)(4)), or where the factual findings of the state court are not fairly supported by the record (sub-section 2254(d)(8)), or where the applicant was denied due process of law in the state court proceeding (sub-section 2254(d)(7)).

After the District Court made preliminary findings which are consistent with the arguments petitioner has maintained throughout the collateral proceedings, it proceeded to resolve the ultimate issues according to the factual determinations of the state appellate court, notwithstanding the district court's variant reading of the trial record. Thus, in disposing of the right-to-counsel issue, the district court declared:

> The Franklin County Court of Appeals found that Mr. Kunstler was not qualified to appear in the Franklin County Municipal Court on behalf of Mr. Ross because he 'would not comply with the standards established by Canon 7 of the Code of Professional Responsibility with respect

> to out-of-court statements . . .' Although the record is susceptible to a contrary interpretation, it is sufficient to support the State court's finding. A United States District Court is compelled to accept such a finding when, as here, it is supported by the record. 28 U.S.C. §2254(d) (emphasis added)(34a)

It is apparent from the foregoing that although it would not independently concur in the state appellate court's finding, the district court believed itself to be barred by subsection 2254(d) from re-examining them. The correct view is that stated in Hill v. Nelson, 466 F. 2d 1346, 1348 (9th Cir. 1972): subsection 2254(d) "provides no basis for . . . relying on factual statements contained in a state appellate opinion." See also Thomas v. Craven, 473 F. 2d 1235 (9th Cir. 1973); Hill v. Craven, 464 F. 2d 1293 (9th Cir. 1972).

In construing that subsection, the district court disregarded the following controlling factors:

1. The Franklin County Court of Appeals is without authority to enter supplementary factual findings in a criminal case. Its jurisdiction in criminal appeals is identical to that of the federal courts of appeals; it may only reach questions of law. See Page's Ohio Rev. Code §2501.02 (Supp., 1974); cf. Page's Ohio Rules of Appellate Procedure 12(B) (1974). If the district court correctly viewed the Franklin County Court of Appeals' findings as "factual" it was compelled to judicially notice that

such findings were beyond the jurisdiction of the state appellate court, and hence were of no legal force or effect. 28 U.S.C. §2254(d)(4).

2. The State appellate court findings, as pointed out above (Point III, supra), denied due process of law because they effected a fundamental change in the theory of the case. It is not conceivable that the federal court is bound by findings which entail a denial of due process. 28 U.S.C. §2254(d)(7).

3. The findings of the State appellate court literally have no foundation at all. We pointed out above that the district court deferentially said "the record is susceptible of a contrary interpretation." (34a). Actually, the record is not susceptible of the interpretation given by the State appellate court, and that Court finding "is not fairly supported by the record." 28 U.S.C. §2254(d)(8).

The rulings of the lower federal courts in this case reflect a patent misconstruction of subsection 2254(d).25/ Contrary to the district court's holding, affirmed sub silencio by the Sixth Circuit, federal habeas courts may not rely on state appellate findings. Thomas v. Craven, supra. State findings of fact "are not

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25/ The district court also adopted the State appellate court's finding that Judge Fais' bias had been fully cleansed from the record, again deferring to the affect of subsection 2254(d) on the Franklin County Court of Appeals' determination. (p. 34a.)

immune, when brought into question in federal habeas corpus, from district court consideration, and, in proper cases, from de novo consideration." England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 417 N. 8 (1964), citing Townsend v. Sain, supra.

This is such a proper case, at least with respect to those findings first made by the Franklin County Court of Appeals. As the Ninth Circuit has specifically held, it is only to the State court trier of fact that subsection 2254(d) accords deferrence. Anderson v. Nelson, 432 F. 2d 55 (9th Cir. 1970). Consequently, the district court had an affirmative duty to make independent determinations of the controlling issues, and not acquiesce, as it reluctantly did, in the Franklin County Court of Appeals' distortions of the record.

Section 2254 is a major stabilizing factor in balancing the competing interests of state sovereignty and constitutional supremecy. In effecting this baiance, that section was not intended, and must not be permitted, to function as a carpet under which injustices may be swept. See Hensley v. Municipal Court, 411 U.S. 345 (1973). Where, as here, lower federal courts erroneously have read subsection 2254(d) as a straightjacket barring review of constitutionally invalid findings by a state appellate court and thereby rendered themselves powerless to reach glaring errors, this Court's intercession is warranted.

CONCLUSION

For the foregoing reasons, petitioner prays that a writ of certiorari issue to review the judgment and opinion of the court below.

Dated: July 8, 1975

Respectfully submitted,

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* Counsel for Petitioners wish to express their gratitude for the invaluable assistance they received from Fred Gross, a law student at Rutgers University School of Law, in the preparation of this petition.

APPENDIX

First Amendment
Constitution of the United States

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment
Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment
Constitution of the United States

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment, Section 1
Constitution of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty or property, without due proces of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 2254. State custody; remedies in Federal courts

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

OHIO REVISED CODE

§2909.21. Trespassing upon lands or premises of another. (GC §12522)

No person shall enter without lawful authority upon the land or premises of another, or being upon the land or premises of another, upon being notified to depart therefrom by the owner or occupant, or the agent or servant of either, without lawful authority neglect or refuse to depart therefrom.

Whoever violates this section shall be fined not more than fifty dollars or imprisoned not more than thirty days, or both.

§2901.25. Assault and battery, and menacing threats. (GC §12423)

No person shall assault or threaten another in a menacing manner, or strike or wound another.

Whoever violates this section shall be fined not more than two hundred dollars or imprisoned not more than six months, or both.

§2923.43. Interferring at scene of fire, accident, or other disaster.

No person shall willfully obstruct, impede or hamper in any way, the lawful operation of sheriffs, policemen, or

other law enforcement officers, or firemen, rescue personnel, medical personnel, or other authorized persons, at the scene of fire, accidents, disasters, or emergencies of any kind, and no person shall willfully fail to obey the lawful orders of sheriffs, policemen, or other law enforcement officers, engaged in the performance of their duties at the scene of or in connection with fires, accidents, disasters or other emergencies of any kind.

Whoever violates this section shall be fined not less than fifty dollars and not more than five hundred dollars or imprisoned in a county jail or workhouse not less than thirty days and not more than six months or both. Nothing in this section shall be construed to limit access or deny information to any news media representatives in the lawful exercise of their duties.

Canon 7 EC 7-33
of Code of Professional Responsibility
Adopted by the Supreme Court of Ohio

"A goal of our legal system is that each party shall have his case, criminal or civil, adjudicated by an impartial tribunal. The attainment of this goal may be defeated by dissemination of news or comments which tend to influence judge or jury. Such news or comments may prevent prospective jurors from being impartial at the outset of the trial and may also interfere with the obligation of jurors to base their verdict solely upon the evidence admitted in the trial. The release by a lawyer of out-of-court statements regarding an anticipated or pending trial may improperly affect the impartiality of the tribunal. For these reasons, standards for permissible and prohibited conduct of a lawyer with respect to trial publicity have been established."

Disciplinary Rules
Dr. 7-107 B, C and D of
the Code of Professional Responsibility
Adopted by the Supreme Court of Ohio

(B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the com-

mencement of the trial or disposition without trial, make or participate in making an extra judicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:

(1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.

(2) The possibility of a plea of guilty to the offense charged or to a lesser offense.

(3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.

(4) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.

(5) The identity, testimony, or credibility of a prospective witness.

(6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

(C)DR 7-107(B) does not preclude a lawyer during such period from announcing:

(1) The name, age, residence, occupation, and family status of the acccused.

(2) If the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.

(3) A request for assistance in obtaining evidence.

(4) The identity of the victim of the crime.

(5) The fact, time, and place of arrest, resistance, pursuit, and use of weapons.

(6) The identity of investigating and arresting officers or agencies and the length of the investigation.

(7) At the time of seizure, a description of the physical evidence seized, other than a confession, admission, or statement.

(8) The nature, substance or text of the charge.

(9) Quotations from or references to public records of the court in the case.

(10) The scheduling or result of any step in the judicial proceedings.

(11) That the accused denies the charges made against him.

(D)During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extra judicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote from or refer without comment to public records of the court in the case.

No. 74-1771

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CHARLES O. ROSS, *Petitioner-Appellant,* v. HONORABLE FRANK REDA, Judge, Franklin County Municipal Court, *Respondent-Appellee.*	APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed February 13, 1975.

Before: PHILLIPS, Chief Judge, MILLER, Circuit Judge, and DEMASCIO, District Judge.*

PER CURIAM. This is an appeal from an order denying the application of Charles O. Ross for a writ of habeas corpus. It is contended that refusal of the Ohio State trial court to admit out-of-state counsel *pro hac vice*[1] to represent Ross at his trial in that court deprived Ross of his Sixth Amendment right to counsel. The out-of-state attorney had been licensed to practice in other jurisdictions, but was not licensed to practice in Ohio. Reference is made to the decisions of the

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* Honorable Robert E. DeMascio, Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

[1] This term refers to the practice of admitting out-of-jurisdiction attorneys who associate with in-state counsel for a particular case. It means literally "for this turn; for this one particular occasion." BLACK'S LAW DICTIONARY 1355 (4th ed. 1968).

BEST COPY AVAILABLE

Ohio Court of Appeals in *State* v. *Ross*, 36 Ohio App. 185, 304 N.E.2d 396 (1973), *cert. denied*, 415 U.S. 904 (1974), for a statement of the facts of this case. We affirm the denial of the writ.

While the Sixth Amendment right "[i]n all criminal prosecutions" to the "assistance of counsel" implies a degree of freedom to be represented by counsel of defendant's choice, this guarantee does not grant the unconditional right to representation in a state court by a particular out-of-state attorney. To the contrary, in *Thomas* v. *Cassidy*, 249 F.2d 91, 92 (4th Cir. 1957), *cert. denied*, 355 U.S. 958 (1958), the Court said:

> [I]t is well settled that permision to a non-resident attorney, who has not been admitted to practice in a court, to appear pro hac vice in a case there pending is not a right but a privilege, the granting of which is a matter of grace resting in the sound discretion of the presiding judge.

Moreover, the Sixth Amendment claim is modified significantly by the actual availability and presence of other competent counsel.

Before his trial in the State court the defendant Ross had retained three lawyers who were licensed to practice in Ohio. These Ohio attorneys were ready and available to represent the defendant. Ross chose to discharge his Ohio lawyers and to present his own case. At least one of these attorneys remained in the courtroom throughout the trial and was available to Ross for consultation at all stages of the proceeding.

The prerogative of a trial judge to exclude out-of-state counsel, like the right of a defendant to be represented by the counsel of his choice, is not an absolute right. In the present case the state trial court denied the application of the out-of-state attorney for admission pro hac vice on the ground that he affirmatively refused to limit his out-of-court statements about the case during its pendency. In his order the

trial judge noted, among other reasons for denying the application, the following:

> [B]ut there is no question in the mind of this Court that the applicant's conduct was unprofessional and in violation of the Code of Professional Responsibility, particularly Canon 7, EC 7-36, DR 7-107 (A) (B); Canon 8, DR 8-102 (B); Canon 9, EC 9-1, 2, 6.

The Ohio Court of Appeals held that the refusal of the out-of-state counsel to limit his out-of-court statements about the case during its pendency constituted a potential violation of Canon 7 of the Ohio Canons of Ethics.

We view this justification as sufficient to warrant the legitimate exercise of the state's power to "require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar . . . ." *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 239 (1957). The states necessarily maintain this power over the admission of attorneys as an "incident to their broader responsibility for keeping the administration of justice and the standards of professional conduct unsullied." *Cohen* v. *Hurley*, 366 U.S. 117, 123-24 (1961); *see State* v. *Hurley*, 366 U.S. 117, 123-24 (1961); *State* v. *Kavanaugh*, 52 N.J. 7, 243 A.2d 225, *cert. denied*, 393 U.S. 924 (1968).

The judge who denied the application for out-of-state representation subsequently disqualified himself. The appellant contends that he was denied a fair trial because the judge chosen as a replacement relied on the prior judge's rulings, without making an independent investigation into their merits. Our examination of the record convinces us that the substituted judge did in fact review the prior rulings and upheld them only after he determined they were correct.

The decision of the District Court is affirmed. No costs are taxed.

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CHARLES O. ROSS,	:	
	:	
Petitioner,	:	
	:	Civil Action
vs.	:	C 2 74-164
	:	
HONORABLE FRANK REDA, Judge	:	
Franklin County Municipal	:	
Court,	:	
Respondent.	:	

OPINION AND ORDER

Petitioner brings this petition for a writ of habeas corpus under the provisions of Title 28, United States Code, Section 2241(c)(3).

This matter is before the Court on the petition, return of writ, traverse, transcript of proceedings in State v. Ross, Case Nos. 13205, 13211, 13212 (Franklin County Municipal Court, March, April and July, 1972), and the briefs and exhibits of the parties.

In July, 1972, petitioner was convicted after a jury trial in the Franklin County, Ohio Municipal Court of failure to depart from school property in violation of Section 2909.21, Ohio Revised

Code; assault in violation of Section 2901.25, Ohio Revised Code; and interference at an emergency in violation of Section 2923.43, Ohio Revised Code. On July 31, 1972, he was sentenced to thirty (30) days imprisonment in the Franklin County Workhouse and given a one hundred fifty dollar ($150.00) fine.

Petitioner appealed the verdict to the Court of Appeals for Franklin County, Ohio. On March 20, 1973, the Court of Appeals issued a decision affirming the judgment of conviction. State v. Ross, 36 Ohio App. 2d 185 (Franklin Cty. Ct. App. 1973).

Petitioner then filed a notice of appeal and motion for leave to appeal to the Ohio Supreme Court. On September 6, 1973, the Ohio Supreme Court dismissed the appeal sua sponte on the ground that no substantial constitutional question was presented.

Petitioner then filed a petition for writ of certiorari in the United States Supreme Court. On February 19, 1974, the United States Supreme Court denied the petition for writ of certiorari.

Petitioner alleges that he is in custody 1/ in violation of the Constitution of the United States in that:

1. The trial court's refusal to permit defendant's retained out-of-state

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1/ Petitioner has already paid the $150.00 fine. He is to commence serving his thirty-day sentence in the Franklin County Workhouse on June 7, 1974. A prisoner is thus able to maintain an action for federal writ of habeas corpus, when his incarceration is not a speculative possibility. Hensley v. Municipal Court, ___U.S.___ (1973). Petitioner is, therefore, in custody within the meaning of 28 U.S.C. Section 2241 (c)(3).

attorney to represent him at trial was a deprivation of his right to the assistance of counsel of his choice as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States.

2. Critical pre-trial motions were decided by a biased judge who was later disqualified; and the trial judge refused to reconsider the prior ruling in violation of the Due Process clause of the Fourteenth Amendment to the United States Constitution.

3. His conviction for failure to depart after being told to do so by Bruce P. Hennick is not supported by any evidence that Bruce P. Hennick instructed him to leave the premises in question.

Respondent concedes that petitioner has exhausted his available state court remedies as to each of these claims for relief as required by 28 U.S.C. Section 2254(b)(c). 2/ Each of these claims for

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2/ In his petition and traverse, petitioner alleges that his arrest and prosecution was for the purpose of discrediting him because of his criticism of Columbus, and Ohio State University officials. These allegations were not presented to the trial court, court of appeals or supreme court. They cannot now be raised for the first time in federal habeas corpus. 28 U.S.C. Section 2254(b), (c).

relief will be discussed separately below.

In the spring of 1971, there were disruptions and some violence at Linden McKinley High School in Columbus, Ohio. In May it was closed for a few days. Linden McKinley High School reopened on May 25, 1971. On the morning of that day, a group of adult residents of the community, including petitioner, was present at the school. A principal at the school, Mr. Reed, made an announcement over the public address system notifying all non-students to leave the building and premises. The prosecution contended that petitioner then walked up to Columbus City Safety Director, James J. Hughes, Jr., and told him,"Hughes, you started a riot here." Mr. Hughes told petitioner that he had been ordered by the principal to leave the school. Petitioner refused to leave the building. Safety Director Hughes then ordered him arrested. He was removed from the building by two Columbus, Ohio police officers.

At the police station Richard Dimel attempted to take petitioner's fingerprints. Petitioner assaulted him by balling up his fist and stepping back as if to strike him.

I.

After the criminal charges were filed against petitioner, two local attorneys who are members of the Ohio bar, Bruce

A. Campbell, Esq. and William E. Boyland, Esq., filed an appearance as counsel for petitioner. On March 10, 1972, a second pretrial conference was held. Mr. Twohig was added as a co-counsel for defendant. At the pretrial, a motion was made to permit William Kunstler, Esq., an attorney not admitted to practice in Ohio, 3/ to appear on behalf of petitioner. Additionally, petitioner moved to represent himself as co-counsel.

On March 10, 1972, a motion was filed seeking the admission of William Kunstler, Esq., pro hac vice. On March 16, 1972, the motion was refiled.

On April 3, 1972, a hearing was held before Judge G.W. Fais on petitioner's motion for the admission of Mr. Kunstler, pro hac vice. No evidence was taken on the motion at the hearing. Mr. Kunstler did appear and address the Court.

3/ Mr. Kunstler is a member of the New York and District of Columbia bars. He has been admitted to practice before the United States Supreme Court, the United States Court of Military Appeals, and the United States Courts of Appeals for the Second, Third, Fourth, Fifth, Seventh, Tenth and District of Columbia Circuits. He has also appeared as counsel in numerous state and federal trial courts.

On April 6, 1972, Judge Fais issued an Opinion refusing Mr. Kuntsler permission to appear pro hac vice on behalf of petitioner. In his Opinion, Judge Fais made the following findings:

> This Court recognizes that prior to the application herein, the defendant had been represented by three local attorneys, all competent and reliable, and there is no question but that defendant's absolute right to counsel of his choice has not been abridged nor denied. None of the local counsel up to the time of the appearance of the applicant ever intimated or stated that the defendant could not, and would not, receive a fair and impartial trial free from bias, passion, prejudice and outside influences. However, with the appearance of the applicant this attitude and temperament suddenly changed.
>
> The first incident occurred when applicant appeared in the vicinity of this Court and held a "press conference" which had been announced in advance of his arrival in the City. During this conference the applicant questioned the integrity, the fairness and the dignity of this Court. Applicant also made mention of a rally later in the day

where the question was to be asked as to whether the defendant could get a fair trial in Columbus.

Such activity questions the propriety of this Court even before the trial is commenced. If such declarations, challenges and circumstances precede the commencement of the impaneling of a jury and the presentation of evidence, what can be expected on April 24, 1972, the date this trial by jury is ordered as well as the days consumed by the trial.

Applicant, in substance, issued a challenge to this Court by stating he had an absolute right to practice law for the purposes of this case. Also, he stated he had "no respect" for this Court during the course of the hearing. The applicant also interrupted the proceedings with his own remarks on other issues raised.

Also in the record is the threat made by applicant that if his Motion was denied, he would take the matter immediately to the federal court, which would materially block and delay the commencement of trial set for April 24, 1972.

Following the hearing, applicant participated in a "rally" at the Ohio State University with his co-counsel and the defendant. Defamatory comments were made about this Court; there was name calling, criticism and clamor directly relating to the issues to be tried. This Court does not feel that it need to point out in detail the applicant's activities at the "rally", but there is no question in the mind of this Court that the applicant's conduct was unprofessional and in violation of the Code of Professional Responsibility, particularly Canon 7, EC7-36, DR7-107(A)(B); Canon 8, DR8-102(B); Canon 9, EC 9-1, 2, 6.

This Court considers the unprofessional conduct on the part of this applicant to be deliberate, wilful and premeditated. The applicant is an officer of the Court with a solemn and serious obligation to his profession, to his client, to the Court and to the public. This Court finds that the applicant has not qualified himself to be admitted pro hac vice in this case, and therefore the application is denied.

On April 6, 1972, petitioner filed an affidavit of prejudice against Judge Fais in the Franklin County, Ohio Common Pleas Court. On July 6, 1972, the Common Pleas Court issued a decision disqualifying Judge Fais. In the Opinion the Court stated:

An examination of the various exhibits attached to plaintiff's file in this matter indicate a considerable amount of notoriety insofar as the case, the judge, the parties, and their counsel are concerned. It is extremely unfortunate that some cases are apparently tried at press conferences rather than in the courtroom.

Through various statements and allegations, both in court and outside the court, it would appear that Judge Fais has been goaded into making statements which, combined with his rulings on said motions might be construed as bias on his part against either the defendant or his attorneys.

* * *

In order to remove any suspicion as to the possibility of prejudice by Judge Fais, this court will disqualify him and appoint a successor Municipal Judge in accordance with Ohio Revised Code, §2937.20.

The Honorable Frank A. Reda, Franklin County Municipal Court Judge was selected by lot to preside over petitioner's case.

On July 6, 1972, counsel for petitioner requested reconsideration of the rulings that Judge Fais had made on prior motions, including the motion to admit Mr. Kunstler pro hac vice.

On July 7, 1972, Judge Reda announced his decision adopting the decisions of Judge Fais on the motions.

On July 10, 1972, Judge Reda heard further arguments on the motion to admit Mr. Kunstler pro hac vice. At the hearing, petitioner stated that:

> From the very beginning there was never any question that on the date this trial was to begin, that Bill Kunstler would be my lawyer and would handle the case here in the Court.

Mr. Kunstler testified that petitioner had designated him "Chief Counsel." Mr. Kunstler also stated that he had represented petitioner on criminal charges against him from the very beginning:

> I have represented Mr. Ross essentially from the beginning of all his legal problems. I came to Columbus in 1970 to represent Ronald Kay, a student who was charged with infractions of a disciplinary code of the Ohio State University. I represented him before that tribunal, he was acquitted of the charge. That's when I first met Charles Ross. This was in 1970, I think in the summer. Then, in 1971 when he was brought up on proceedings under 1219 I represented him before the same tribunal, and he was acquitted in that case. The charges were dismissed on Constitutional

> grounds. . . . I represented him in those two proceedings, and the moment this proceeding started in May of 1971 he asked me to represent him. I did so at the time when Mr. Twohig I don't think was in Columbus or was involved in the matter at all, and I represented him throughout. In fact, Your Honor, I brought my file to the Court to show the breadth of this file involving Charles Ross in all of these proceedings. I have represented him as chief counsel in this matter. He has asked me to be . . ..

Counsel for petitioner at the July 10, 1972 hearing objected to Judge Fais' decision denying Mr. Kunstler permission to appear on the ground that it was made without the taking of evidence and based entirely upon hearsay newspaper reports that Mr. Kunstler had engaged in unprofessional conduct at a press conference and rally. They stated that there were a number of erroneous newspaper articles which had appeared concerning petitioner's case. Mr. Kunstler specifically denied making the statements attributed to him in Judge Fais' Opinion.

At the July 10, 1972 hearing, Mr. Kunstler asserted that he should be permitted to represent Mr. Ross because he was an attorney in good standing. He argued further that:

> If I don't conduct myself as an attorney should in the

court room, Your Honor has procedures to either order me out. . . or take disciplinary action against me.

Judge Reda then questioned Mr. Kunstler:

I am concerned about your conduct outside of the court room. I have never met you before, Mr. Kunstler, but I had reports about your conduct. Not only in this jurisdiction but also in other jurisdictions outside the court room.

Now, do you have any statements that you would like to make to the Court with respect to what you believe an attorney's conduct should be outside the court room?

Mr. Kunstler responded, in relevant part:

Surely, Your Honor, I would be glad to. Outside the court room I have every right to all the First Amendment privileges of any other person. [Mr. Kunstler then referred to Chase v. Robson, 435 F. 2d 1059 (7th Cir. 1970.)] They said in that case that unless you can show by an evidentiary hearing that there is a clear and present danger to the administration of justice, no court can bind a lawyer or his client from speaking in a criminal matter outside the court room, from making extra-judicial statements. This is the standard which I have now adopted

> for myself. I think it's the law of the land, and I think it's clear. . . . So I would never promise Your Honor that I would not speak outside. I will speak outside, because I think to bind me would be unconstitutional and would make attorneys have different First Amendment rights than anybody else.. . .

The Court ruled that nothing new had been presented on the motion to admit Mr. Kunstler pro hac vice. Its previous decision was reaffirmed.

No pretrial order was ever entered concerning pretrial publicity or the out-of-court statements of counsel. The trial court did not indicate to counsel at any of the pretrial hearings that particular out-of-court conduct should be avoided.

The Court of Appeals for Franklin County, Ohio held that Mr. Kunstler's alleged out-of-court comments at a press conference and rally were not sufficient grounds to exclude him as counsel, because there was no evidence of record that Mr. Kunstler had in fact engaged in the alleged unprofessional conduct. State v. Ross, 36 Ohio App. 2d supra at 191. Newspaper articles are not sufficient grounds for a finding of fact concerning an attorney's conduct out of the presence of the court. Newspaper articles are inadmissible hearsay to prove the fact of improper out-of-court conduct. If such conduct is to be proven, witnesses who heard the attorney's out-of-court statement must be sworn under oath and subjected to cross examination. Neither Judge

Fais nor Judge Reda took evidence on the alleged improper professional conduct of Mr. Kunstler.

Instead, the Court of Appeals for Franklin County, Ohio based its decision upon two grounds not expressly relied upon by either Judge Fais or Judge Reda. First, the Court of Appeals held that:

> Each state has the right to regulate the practice of law within its jurisdiction, and to require that a person be admitted to practice by that state before he may be permitted to act as the attorney for any person in that state, including representation in a criminal matter. Thus, the constitutional right to representation by counsel was limited, with regard to the states, to counsel admitted to practice in that state, unless no competent counsel so admitted is available. Defendant makes no contention that the three Ohio attorneys representing him were not competent to do so.
>
> State v. Ross, 36 Ohio App. 2d. supra, at 187-188.

Second, the Court of Appeals held that Mr. Kunstler's statement to Judge Reda at the July 10, 1972 hearing that the Court did not have power to prohibit him from speaking outside the court room was in violation of Canon 7 of the Code of Professional Responsibility as adopted by the Supreme Court of Ohio. The Court of Appeals' analysis was as follows:

Canon 7 deals with the subject at hand. With respect to ethical considerations, EC 7-33 provides as follows:

> "A goal of our legal system is that each party shall have his case, criminal or civil, adjudicated by an impartial tribunal. The attainment of this goal may be defeated by dissemination of news or comments which tend to influence judge or jury. Such news or comments may prevent prospective jurors from being impartial at the outset of the trial and may also interfere with the obligation of jurors to base their verdict solely upon the evidence admitted in the trial. The release by a lawyer of out-of-court statements regarding an anticipated or pending trial may improperly affect the impartiality of the tribunal. For these reasons, standards for permissible and prohibited conduct of a lawyer with respect to trial publicity have been established."

The disciplinary rules specifically deal with the question of trial publicity and DR 7-107(B) provides as follows:

> "A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the

issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:

(1) the character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.

(2) the possibility of a plea of guilty to the offense charged or to a lesser offense.

(3) the existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.

(4) the performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.

(5) the identity, testimony or credibility of a prospective witness.

(6) any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case."

DR7-107(B) does not preclude a lawyer during such period from announcing:

(1) the name, age, residence, occupation, and family status of the accused.

(2) if the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.

(3) a request for assistance in obtaining evidence.

(4) the identity of the victim of the crime.

(5) the fact, time and place of arrest, resistance, pursuit, and use of weapons.

(6) the identity of investigating and arresting officers or agencies and the length of the investigation.

(7) at the time of seizure, a description of the physical evidence seized, other than a confession, admission or statement.

(8) the nature, substance or text of the charge.

(9) quotations from or references to public records of the court in the case.

(10) the scheduling or result of any step in the judicial proceedings.

(11) that the accused denies the charges made against him."

DR7-107(D) deals specifically with out-of-court statements during trial, and provides as follows:

"During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extra-judicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote from or refer without comment to public records of the court in the case."

From Mr. Kunstler's statement, the trial court was justified in conclusing that Mr. Kunstler would not comply with the standards established by Canon 7 of the Code of Professional Responsibility with respect to out-of-court statements but, rather, would only comply with the lesser standard of Chase [v. Robson, 435 F. 2d 1059 (7th Cir.

1970)] as he interpreted that standard to be. We find Canon 7 of the Code of Professional Responsibility, as recommended by the American Bar Association and adopted by the Supreme Court of Ohio, to be a constitutionally valid regulation of the conduct of attorneys with respect to out-of-court statements concerning pending litigation. In fact, such Canon would seem to be required by Sheppard v. Maxwell, (1966), 384 U.S. 333 . . .

State v. Ross, 36 Ohio App. 2d supra at 193-196.

The assertion that a trial court has the unreviewable discretion to refuse to admit, pro hac vice, a criminal defendant's otherwise fully qualified counsel on the sole ground that he is not a member of the bar of the court's jurisdiction is untenable. The Sixth Amendment guarantees that

> [i]n all criminal prosecutions, the accused shall enjoy the right. . . to have the assistance of counsel for his defense.

This right has always been regarded to be the right to have counsel of one's own choice. See, e.g. Powell v. Alabama, 287 U.S. 45, 69 (1932); Reynolds v. Cochran, 363 U.S. 525, 531 (1961); Chandler v. Fretag, 348 U.S. 3, 9-10 (1954); Bacher v. Commissioner of Internal Revenue, 275 F. 2d 141 (5th Cir. 1960); People v. Price, 262 N.Y. 410, 412, 187 N.E. 298, 299(1933); State v. Long, 166 S.E. 2d 365, 366 (Ga. App. 1969); Chivers v. State, 5 Ga. App.

654, 63 S.E. 703, 705 (1909). Admission to the bar of the State of prosecution cannot be the sole reason for disqualification of counsel.

It is undisputed that a State may "require high standards of qualification, such as good moral character or proficiency in its laws, before it admits an applicant to the bar . . ." Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232, 239 (1957). But if the counsel of a criminal's choice meets these standards, he should be admitted pro hac vice. United States v. Bergamo, 154 F. 2d 31 (3rd Cir. 1946); Magee v. Superior Court, 8 Cal. 3d 949, 954 (Calif. S. Ct. 1973) (In bank). See, Banks v. Holder, No. 73-1332 (7th Cir. May 17, 1973), cert. granted 14 Crim. L. Rptr. 4159 (1973), cert. dismissed as improvidently granted, 15 Crim. L. Rptr. 4061 (1974).

The Franklin County Court of Appeals found that Mr. Kunstler was not qualified to appear in the Franklin County Municipal Court on behalf of Mr. Ross because he "would not comply with the standards established by Canon 7 of the Code of Professional Responsibility with respect to out-of-court statements . . ." Although the record is susceptible of a contrary interpretation, it is sufficient to support the State court's finding. A United States District Court is compelled to accept such a finding when, as here, it is supported by the record. 28 U.S.C. §2254(d).

This Court concludes that, consistent with the factual determination of

the Franklin County Court of Appeals, petitioner was not deprived of his right to the assistance of counsel of his choice for the reason that because of his refusal to accept the conditions of Canon 7, Mr. Kunstler was not qualified for admission pro hac vice.

The Court HOLDS that petitioner's first claim for relief is without merit.

II.

Petitioner contends that he was denied a due process hearing on the pretrial motions which were originally decided by Judge Fais.

On April 6, 1972, petitioner filed a motion to disqualify a judge under §2937.20, Ohio Revised Code and to dismiss the criminal affidavits. The motion was accompanied by an affidavit alleging the prejudice of Judge Fais.

On the same day Judge Fais issued a decision refusing the admission of Mr. Kunstler as counsel pro hac vice.

On April 7, 1972, Judge Fais denied petitioner's motion to suppress evidence of electronic surveillance. 4/

On April 10, 1972, Judge Fais denied the following motions: motion for a bill of particulars; motion for discovery;

4/ Petitioner's counsel had previously conceded the motion was moot because the prosecution knew of no electronic surveillance of petitioner.

motion for an individual voir dire of prospective jurors; motion to dismiss the criminal affidavits because of the systematic exclusion of newly enfranchised young and black voters from the jury; and a motion to dismiss the criminal affidavits because of the selective arrest of petitioner on the basis of his race.

Petitioner did not appeal any of these adverse rulings.

The Court of Appeals for Franklin County, Ohio made a finding of fact with respect to this claim for relief which is binding on this Court. 28 U.S.C. §2254(d). The Court of Appeals found, and the record substantiates, "that Judge Reda reviewed all the various motions filed by defendant, and ruled on them." State v. Ross, 36 Ohio App. 2d supra at 202. 5/

The Court HOLDS that petitioner's second claim for relief is without merit, because it is not supported by the record.

5/ The Court of Appeals further found that:

> The record is clear that Judge Reda did not "allow" previous rulings to stand but, rather, reviewed all of the motions and made his own rulings thereon, which were the same in result as the previous rulings.
>
> State v. Ross, 36 Ohio App. 2d supra at 204.

III.

Petitoner contends that he was denied due process of law because the prosecution failed to prove, as alleged in the affidavit charging the crime, that Bruce P. Hennick instructed petitioner to leave the premises of Linden McKinley High School.

The petitioner was charged with failing to leave Linden McKinley High School after being notified to do so in violation of §2909.21, Ohio Revised Code. The affidavit stated that petitioner was ordered to leave by Principal Bruce Hennick. Proof at trial was that the order to leave the premises was in fact given by Principal Reed. The Court of Appeals held that petitioner was not prejudiced by the variance between the affidavit and the proof at trial. State v. Ross, 36 Ohio App. 2d supra at 207-208.

The due process clause of the Fourteenth Amendment requires that the conviction of a criminal defendant be based upon proof beyond a reasonable doubt as to each fact essential to prove the offense charged. In re Winship, 397 U.S. 358, 363-364 (1970). If a conviction is totally devoid of evidentiary support, it is unconstitutional under the due process clause of the Fourteenth Amendment. Garner v. Louisiana, 368 U.S. 157, 163 (1961); Gregory v. Chicago, 394 U.S. 111 (1969); Thompson v. Louisville, 362 U.S. 199 (1960). However, questions relating to the weight and sufficiency of the evidence are not cognizable in federal habeas corpus. Ballard v. Howard, 403

F. 2d 653 (6th Cir. 1968); Fernandez v. Klinger, 346 F. 2d 210 (9th Cir.) cert. denied, 382 U.S. 895 (1965).

There was sufficient evidence before the jury to prove each essential element of a violation of §2909.21, Ohio Revised Code. The error, if any, was trial court error which does not raise a federal constitutional question. See, Donnelly v. De Christoforo, ___ U.S. ___ (1974); Moore v. Illinois, 408 U.S. 786, 799 (1972); Reese v. Cardwell, 410 F. 2d 1125 (6th Cir. 1969).

The Court HOLDS that petitioner's third claim for relief is without merit.

WHEREUPON, the Court FURTHER HOLDS that the petition is without merit, and therefore it is DENIED.

This action is hereby DISMISSED.

_____
Chief Judge
United States District Court

THE STATE OF OHIO, APPELLEE, *v.* ROSS, APPELLANT.
[Cite as State v. Ross (1973), 36 Ohio App. 2d 185.]

Criminal procedure—Right to counsel—May be limited, how—Refusal to accept Ohio attorney—Out of state counsel—May be excluded, when—Waiver of right to counsel, when—No right to continuance—Fair trial Canon 7, Code P. R.

1. The constitutional right to be represented by counsel may be limited by a state to those persons admitted to practice in such state, unless there is no such competent counsel available.
2. Whether to permit representation by out-of-state counsel in addition to competent Ohio counsel is a matter lying within the sound discretion of the court, and where responses of such out-of-state counsel to an inquiry by the court justifies the court in concluding that such counsel will not comply with the standards established by Canon 7 of the Code of Professional Responsibility, the court does not abuse its discretion in denying representation by such out-of-state counsel.
3. Where an accused is lawfully denied the right to be represented by out-of-state counsel, his refusal to proceed with his retained competent Ohio attorney is a waiver of his constitutional right to counsel.

(No. 72AP-229—Decided March 20, 1973.)

APPEAL: Court of Appeals for Franklin County.

Mr. James J. Hughes, Jr., city attorney, *Mr. Daniel W. Johnson*, city prosecutor, and *Mr. Carl T. Wolfrom*, for appellee.

Mr. R. Raymond Twohig, Jr., for appellant.

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WHITESIDE, J. This is an appeal from a judgment of the Franklin County Municipal Court.

Defendant was arrested on May 25, 1971, during a disturbance at Linden-McKinley High School in Columbus, Ohio. Three affidavits were filed against defendant as an outgrowth of this incident: (1) that he willfully obstructed, impeded and hampered the lawful operations of the safety director of the city of Columbus at the scene of an emergency, in violation of R. C. 2923.43; (2) that he did, on May 25, 1971, upon being notified to depart from the premises of Linden-McKinley High School by a servant of said school, neglect and refuse to depart therefrom, in violation of R. C. 2909.21; and (3) that he, on the same date, did unlawfully assault Richard F. Dimel, in violation of R. C. 2901.25.

Defendant was originally represented by attorneys Bruce A. Campbell and William E. Boyland, and a pretrial was held on June 25, 1971. At this pretrial, motions filed by defendant were discussed and it was agreed that the case would not be assigned for trial until after the middle of September, 1971. The trial did not take place at that time and a second pretrial was held on March 10, 1972. At this time, R. Raymond Twohig, Jr., was added as one of the attorneys for defendant, and a motion was made to permit Mr. William Kunstler, an attorney in another state not admitted to practice in Ohio, to also appear on behalf of defendant, and also to permit the defendant to represent himself as co-counsel with the other counsel. Additional motions were also filed on behalf of defendant, and the case was set for trial on Monday, April 24, 1972. The motions to permit Mr. Kunstler to appear as one of the attorneys for defendant was overruled, as was the motion to permit defendant to act as his own co-counsel.

The trial did not take place April 24, 1972, due in part to successful efforts on the part of defendant to have the trial judge presiding over the case replaced. A trial judge was selected by lot, and the case proceeded to trial on July 10, 1972. Prior to trial, the trial judge reviewed all the motions filed on behalf of defendant and reached the same conclusions as were originally reached. The new trial judge, Judge Reda, listened to extensive arguments on behalf of permitting Mr. Kunstler to represent defendant, and on the day of trial again overruled the motion. Defendant, thereupon, dismissed and discharged his three Ohio counsel, but the trial proceeded nevertheless. The trial resulted in a jury verdict of guilty to all three charges.

Defendant appeals raising four assignments of error as follows:

"1. The trial court's refusal to permit defendant to be represented by his experienced out-of-state attorney who is a member in good standing of numerous federal and state bars, and who stands convicted of no contempt of court and is without a disciplinary blemish on his record during years at the bar, violated defendant's right to counsel of his choice under the Sixth and Fourteenth Amendments of the United States Constitution, as well as Article I, Section 10 of the Ohio Constitution, as well as the First Amendment of the United States Constitution, and was without factual or legal basis.

"2. The failure of the trial judge to treat as void the prior rulings in this case of another municipal judge who had been disqualified due to bias and prejudice and especially those rulings made after the filing of the Affidavit of Prejudice, violates the right to due process protected by the Fourteenth Amendment to the United

States Constitution and the Ohio Constitution, as well as Section 2937.20 of the Ohio Revised Code.

"3. The arrest of appellant for a misdemeanor by the Director of Public Safety is contrary to Section 2935.03 of the Ohio Revised Code.

"4. The conviction for failure to depart after being told to do so by Bruce P. Hennick is not supported by any evidence that Bruch [sic] P. Hennick instructed defendant to leave the premises in question."

By his first assignment of error, defendant contends that the Sixth and Fourteenth Amendments to the United States Constitution, and Section 10, Article I of the Ohio Constitution give to him the right to be represented by any counsel of his choice, whether or not such counsel is an attorney admitted to practice in Ohio. Each state has the right to regulate the practice of law within its jurisdiction, and to require that a person be admitted to practice by that state before he may be permitted to act as the attorney for any person in that state, including representation in a criminal matter. Thus, the constitutional right to representation by counsel is limited, with regard to the states, to counsel admitted to practice in that state, unless no competent counsel so admitted is available. Defendant makes no contention that the three Ohio attorneys representing him were not competent to do so.

The general policy of Ohio is expressed in R. C. 4705.01 as follows:

"No person shall be permitted to practice as an attorney and counselor at law, or to commence, conduct, or defend any action or proceeding in which he is not a party concerned, either by using or subscribing his own name, or the name of another person, unless he has been

admitted to the bar by order of the supreme court in compliance with its prescribed and published rules. Admission to the bar shall entitle such person to practice before any court or administrative tribunal without further qualification or license."

It has, however, been generally recognized that an attorney not admitted to practice in Ohio, but in good standing in another state, may be specially admitted for the purpose of representing a person in a particular case, be it civil or criminal. Whether or not so to specially permit an attorney not admitted to practice in Ohio, but admitted to practice and in good standing in another state, to represent a party in a particular action, is a matter lying within the sound discretion of the trial court. Thus, we must determine whether there has been an abuse of discretion in this instance.

While R. C. 4705.01 does not specifically provide for such special permission of out-of-state attorneys to appear in litigation in Ohio, it is recognized by Section 8(C) of Gov. R. 1, as follows:

"An applicant under this section shall not engage in the practice of law in this state prior to the filing of his application. To do so constitutes the unauthorized practice of law and will result in a denial of the application. This paragraph (C) does not apply to participation by a nonresident of Ohio in a cause being litigated in this state when such participation is with leave of the judge hearing such cause."

This practice also is recognized by the ethical considerations of Canon 3 of the Code of Professional Responsibility, adopted by the Supreme Court of Ohio. EC 3-9 provides as follows:

"Regulation of the practice of law is accomplished principally by the respective states. Authority to engage

in the practice of law conferred in any jurisdiction is not per se a grant of the right to practice elsewhere, and it is improper for a lawyer to engage in practice where he is not permitted by law or by court order to do so. However, the demands of business and the mobility of our society pose distinct problems in the regulation of of the practice of law by the states. In furtherance of the public interest, the legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice."

Notice should also be made of the disciplinary rules of Canon 3, DR 3-101(B) of which provides that:

"A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction."

In *Parker* v. *Parker* (Fla. 1957), 97 So. 2d 136, the court interpreted the rule of the Florida Supreme Court providing that "A practicing attorney of another state, in good standing, who had professional business in a court of record of this state may, upon motion, be permitted to practice for the purpose of such business only, when it is made to appear that he has associated and appearing with him in such business an active member of the Florida Bar." The court at 137, expressly held: "The right of an attorney of another state to practice is permissive and subject to the sound discretion of the court to which he applies for the permission." The Supreme Court of New Jersey considered a similar con-

tention in *State v. Kavanaugh* (1968), 52 N. J. 7, 243 A. 2d 225, stating, at 18, 243 A. 2d 231:

"Mr. Bailey's clients urge a constitutional right to select an attorney who is not a member of our Bar. So long as the Bar of our State is able, willing and free to provide effective counsel, there is no such right. *Thomas v. Cassidy*, 249 F. 2d 91 (4 Cir. 1957), certiorari denied, *Fitzgerald v. Cassidy*, 355 U. S. 958, 78 S. Ct. 544, 2 L. Ed. 2d 533 (1958); *People of State of New York v. Epton*, 248 F. Supp. 276 (S. D. N. Y. 1965); see *Parker v. Parker*, 97 So. 2d 136 (Dist. Ct. App. Fla. 1957); *Johnson v. DiGiovanni*, 347 Mich. 118, 78 N. W. 2d 560, 565 (Sup. Ct. 1956). This is not a situation in which no member of the local Bar will act. See *Lefton v. City of Hattiesburg, Mississippi*, 333 F. 2d 280 (5 Cir. 1964). There is no dearth of competent attorneys in our State ready to meet the constitutional right to counsel. There is nothing provincial about the requirement for admission to practice in the courts of a State. The courts of every jurisdiction must have control of practice before them as an 'incident to their broader responsibility for keeping the administration of justice and the standards of professional conduct unsullied.' *Cohen v. Hurley*, 366 U. S. 117, 123-124, 81 S. Ct. 954, 958, 6 L. Ed. 2d 156, 162 (1961).

"Defendants refer to *United States v. Bergamo*, 154 F. 2d 31 (3 Cir. 1946), but that case dealt with practice in the federal courts. This was made clear in *Cooper v. Hutchinson*, 184 F. 2d 119 (3 Cir. 1950), where the same court described as 'startling' the suggestion that the courts of the States are bound to permit out-of-state attorneys to practive before them (p. 122). The *Cooper* case goes no further than to say that a constitutional issue is projected if an attorney admitted *pro hac vice* is removed in midstream for no reason at all and without

a chance to be heard. See *Laughlin v. Eicher*, 79 U. S. App. D. C. 266, 145 F. 2d 700 (D. C. Cir. 1944), certiorari denied, 325 U. S. 866, 65 S. Ct. 1403, 89 L. Ed. 1985 (1945); *United States v. Madsen*, 148 F. Supp. 625, 16 Alaska 651 (D. Alaska 1957)."

The original trial judge, who was later disqualified, rendered a written decision denying the application for participation of the out-of-state counsel, indicating that the decision was predicated, at least in part, upon a finding of unprofessional conduct by the out-of-state attorney in connection with a press conference and rally. At the hearing before Judge Reda, on July 10, 1972, one of the Ohio counsel for defendant stated, with respect to that decision:

"[It] was made without taking evidence, Your Honor. And it was entirely outside of the record and must have been based on hearsay. I don't know where it came from. It may have come from an erroneous newspaper article, there have been a number of them connected with this case."

Except for the decision, and argument at the July 10th hearing, we find no reference in the record to the press conference or rally.

However, at the July 10, 1972, hearing, Judge Reda directed the following to Mr. Kunstler:

"* * * I am concerned about your conduct outside the court room. I have never met you before, Mr. Kunstler, but I had reports about your conduct. Not only in this jurisdiction but also in other jurisdictions outside the court room.

"Now, do you have any statements that you would like to make to the Court with respect to what you believe an attorney's conduct should be outside of the court room?"

Mr. Kunstler replied, in pertinent part, as follows:

"Surely, Your Honor, I would be glad to. Outside of the court room I have every right to all the First Amendment privileges of any other person. I might add to Your Honor that the United States Court of Appeals for the Seventh Circuit ruled on that not in my case, in a case long before mine, where they held that an order of a District Judge forbidding lawyers to speak on the case before the Court outside the court was unconstitutional and granted mandamus, which is Chase versus Robeson [sic]. I think 1969 or '70 in the Seventh Circuit. And they said in that case, and I lived by that case since then, they said in that case that unless you can show by an evidentiary hearing that there is a clear and present danger to the administration of justice, no court can bind a lawyer or his client from speaking in a criminal matter outside the court room, from making extrajudicial statements. This is the standard which I have now adopted for myself. I think it's the law of the land, and I think it's clear. It has just been litigated both in New York and Florida and found to be exactly that. So I would never promise Your Honor that I would not speak outside. I will speak outside, because I think that to bind me would be unconstitutional and would make attorneys have different First Amendment rights than anybody else. But I say that I will stay within the bounds of that court decision, which is the law of this land, Chase versus Robeson [sic] and I will stay within the bounds of that decision as I have. * * *"

In *Chase v. Robson* (C. C. A. 7, 1970), 435 F. 2d 1059, the Federal District Court had entered an order restricting out-of-court comments by parties and counsel. The trial court order was predicated in part upon the following, as quoted by the Circuit Court of Appeals, at pages 1060-1061:

" 'This court takes judicial notice of the fact that one of the attorneys in this case, William C. Cunningham, was co-counsel in a similar case arising out of a raid upon a Selective Service office in Catonsville, Maryland. *United States v. Moylan*, 417 F. 2d 1002 (4th Cir. 1969). Also counsel of record in the appeal of the *Moylan* case was one William M. Kunstler, who has repeatedly and brazenly transgressed the local rules of this District Court, the Canons of Professional Ethics, and the spirit of the *Sheppard* decision *(Sheppard v. Maxwell*, 384 U. S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600) by continuous inflammatory public statements concerning jurors, witnesses, evidence, the judge, and rulings by the court throughout the course of the trial in *United States v. Dellinger et al.*, No. 69 CR 180.

" '* * *.

" 'Counsel in this case is experienced with the problems inherent in a case involving controversial issues and defendants. From his association with Kunstler, he should also be aware of the irreparable damage wrought to our legal system and to the dispassionate rule of law which occurs when counsel and parties engage in a strategy designed to inflame public passion and prejudice. Such misconduct destroys one or both parties' right to trial in a calm and serene atmosphere which the Supreme Court directed trial judges to maintain in the *Sheppard* decision.' "

In commenting upon this aspect of the case, the court of appeals stated, at page 1061:

"Any associations that one of the defendants' attorneys may have had or continues to have with another attorney not involved in this case is irrelevant and not in any way supportive of the trial court's order."

The court did hold, at page 1061, as follows:

"We hold that before a trial court can limit defendants' and their attorneys' exercise of first amendment rights of

freedom of speech, the record must contain sufficient specific findings by the trial court establishing that defendants' and their attorneys' conduct is 'a serious and imminent threat to the administration of justice.' *Craig v. Harney*, 331 U. S. 367, 373, 67 S. Ct. 1249, 1253, 91 L. Ed. 1546 (1947). Applying either the standard that the speech must create a 'clear and present danger,' *Wood v. Georgia*, 370 U. S. 375, 82 S. Ct. 1364, 8 L. Ed. 2d 569 (1962), of a serious and imminent threat to the administration of justice or the lesser standard that there must be a 'reasonable likelihood,' *United States v. Tijerina*, 412 F. 2d 661 (10th Cir. 1969), of a serious and imminent threat to the administration of justice, we hold that the trial court's order is constitutionally impermissible."

Chase dealt with rules imposed by a trial court with respect to the trial of a single case and did not involve general rules prescribed for the conduct of attorneys such as are contained in the Code of Professional Responsibility adopted by the Supreme Court of Ohio. Canon 7 deals with the subject at hand. With respect to ethical considerations, EC 7-33 provides as follows:

"A goal of our legal system is that each party shall have his case, criminal or civil, adjudicated by an impartial tribunal. The attainment of this goal may be defeated by dissemination of news or comments which tend to influence judge or jury. Such news or comments may prevent prospective jurors from being impartial at the outset of the trial and may also interfere with the obligation of jurors to base their verdict solely upon the evidence admitted in the trial. The release by a lawyer of out-of-court statements regarding an anticipated or pending trial may improperly affect the impartiality of the tribunal. For these reasons, standards for permissible and prohibited conduct of a lawyer with respect to trial publicity have been established." The disciplinary rules

specifically deal with the question of trial publicity and DR 7-107(B) provides as follows:

"A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:

"(1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.

"(2) The possibility of a plea of guilty to the offense charged or to a lesser offense.

"(3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.

"(4) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.

"(5) The identity, testimony, or credibility of a prospective witness.

"(6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case."

DR 7-107(C) provides certain announcements that may be made by attorneys and provides as follows:

"DR 7-107(B) does not preclude a lawyer during such period from announcing:

"(1) The name, age, residence, occupation, and family status of the accused.

"(2) If the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.

"(3) A request for assistance in obtaining evidence.

"(4) The identity of the victim of the crime.

"(5) The fact, time, and place of arrest, resistance, pursuit, and use of weapons.

"(6) The identity of investigating and arresting officers or agencies and the length of the investigation.

"(7) At the time of seizure, a description of the physical evidence seized, other than a confession, admission, or statement.

"(8) The nature, substance, or text of the charge.

"(9) Quotations from or references to public records of the court in the case.

"(10) The scheduling or result of any step in the judicial proceedings.

"(11) That the accused denies the charges made against him."

DR 7-107(D) deals specifically with out-of-court statements during trial, and provides as follows:

"During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote from or refer without comment to public records of the court in the case."

It is readily apparent that the guidelines of *Chase*, *supra*, are inconsistent with Canon 7 of the Code of Professional Responsibility, as adopted by the Supreme Court of Ohio. From Mr. Kunstler's statement, the trial court was justified in concluding that Mr. Kunstler would not comply with the standards established by Canon 7 of the Code of Professional Responsibility with respect to out-of-court statements but, rather, would only comply

with the lesser standard of *Chase* as he interpreted that standard to be. We find Canon 7 of the Code of Professional Responsibility, as recommended by the American Bar Association and adopted by the Supreme Court of Ohio, to be a constitutionally valid regulation of the conduct of attorneys with respect to out-of-court statements concerning pending litigation. In fact, such canon would seem to be required by *Sheppard v. Maxwell* (1966), 384 U. S. 333, 86 S. Ct. 1507, wherein it is stated, at pages 361, 86 S. Ct. at 1521, 1522:

"More specifically, the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case. See *State v. Van Duyne*, 43 N. J. 39, 389, 204 A. 2d 841, 852 (1964), in which the court interpreted Canon 20 of the American Bar Association's Canons of Professional Ethics to prohibit such statements."

The Supreme Court further stated, at page 363, 86 Sup. Ct. at 1522, as follows:

"The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures."

Also referred to before the trial court was the matter

of the contempt charges growing out of the Chicago trial. Mr. Kunstler stated, in this regard:

"* * * One of the reasons Judge Fais gave was my contempt of court convictions in Illinois growing out of the Chicago trial, and those convictions have been reversed. Not only reversed, but half of them thrown out as being unwarranted, and the rest ordered for a new trial before a jury and out of the jurisdiction of the district judge in Illinois. * * * They are at this point not germane to practice anywhere else in the United States in my opinion, because they are reversed. * * *"

In connection with our overruling of a motion to permit out-of-state counsel to participate in the prosecution of this appeal, we set forth four non-exclusive questions that may be utilized, three of which are pertinent to the trial court, the fourth being whether such out-of-state counsel represented the party at the trial in the lower court. These three questions are:

(1) Did there exist a long-standing close personal relationship between the party and the out-of-state counsel? (2) Is the out-of-state counsel the customary counsel for the party in jurisdictions where such out-of-state counsel is admitted to practice? and (3) What is the situation with respect the availability of counsel admitted to practice in Ohio who are competent to represent the party in the case? There is no contention that the second and third of these questions apply. There has been some contention that the first does.

At the July 10, 1972, hearing before Judge Reda, Mr. Kunstler stated:

"* * * I have represented Mr. Ross essentially from the beginning of all his legal problems. I came to Columbus in 1970 to represent Ronald Kay, a student who was charged with infractions of a disciplinary code of the Ohio State University. I represented him before that

tribunal, he was acquitted of the charge. That's when I first met Charles Ross. This was in 1970, I think in the summer. Then in 1971 when he was brought up on proceedings under 1219 I represented him before the same tribunal, and he was acquitted in that case. The charges were dismissed on Constitutional grounds. * * * I represented him in those two proceedings, and the moment this proceeding started in May of 1971 he asked me to represent him. I did so at the time when Mr. Twohig I don't think was in Columbus or was involved in the matter at all, and I represented him throughout. In fact, Your Honor, I brought my file to the Court to show the breadth of this file involving Charles Ross in all of these proceedings. I have represented him as chief counsel in this matter. He has asked me so to be. * * *"

The defendant himself stated that Mr. Kunstler "has been my attorney now for more than a year and a half."

The record, however, reflects that the defendant was represented by Messrs. Campbell and Boyland from May 1971 to March 1972, with no indication of any representation by other counsel. In March 1972, Mr. Twohig was added as counsel and, at approximately the same time, a motion for participation by Mr. Kunstler was made for the first time. At the March 10, 1972, pretrial, Mr. Boyland stated as follows:

"* * * It is my understanding that Mr. Twohig will be mainly responsible for the case so far as trial of the case and pretrial matters are concerned. * * *" Contrary to this, the defendant stated at the July 10th hearing:

"* * * But from the very beginning there was never any question that on the date this trial was to begin, that Bill Kunstler would be my lawyer and would handle the case here in the court. * * *" Mr. Kunstler also stated that "* * * He asked for me to be his chief counsel.* * *"

Furthermore, Mr. Kunstler, in a letter "motion" dated

March 15, 1972, and filed with the trial court on March 16, 1972, stated as follows:

"This is to inform you that I represent Professor Ross in the above cases as co-counsel. While I may not be present at every session of court due to prior commitments, I will continue to so represent him in conjunction with his other attorneys and himself."

In *United States v. Bergamo* (C. C. A. 3, 1946), 154 F. 2d 31, there is some similarity to this case. In that case, the federal district court denied admittance to a nonresident counsel, and the resident counsel declined to proceed with the case. However, the federal district court denied a continuance to the resident counsel, who contended that he was not familiar with the case. Not only did *Bergamo* involve a federal district court, not a state court, but, unlike this case, the resident counsel was not familiar with the case. Here, there can be no doubt of the familiarity of the Ohio counsel with this case. They have participated throughout. Furthermore, the defendants in *Bergamo* were nonresidents, and the out-of-state counsel by whom they wished to be represented was an attorney admitted to practice in the state of which they were residents.

Here, an Ohio resident seeks to be represented by an attorney who is not admitted to practice in Ohio. By Mr. Kunstler's own statement, he first became acquainted with the defendant in the summer of 1970 during a university disciplinary proceeding in Ohio involving another person, less than a year before the institution of the present litigation. Defendant stated: "From the very beginning there was never any question" that Mr. Kunstler "would be my lawyer and would handle the case here in court." However, the record indicates that the defendant was personally present at both the June 25, 1971, and March 10, 1972, pretrials. No mention or indication of any intention to request leave for Mr. Kunstler to rep-

resent defendant was made at the June 25, 1971 pretrial. As indicated above, at the March 10, 1972 pretrial, it was indicated that Mr. Twohig would be "mainly responsible" for the trial of the case, although a request for Mr. Kunstler's *pro hac vice* admission was made at that time.

In support of a motion to dismiss, filed on behalf of defendant on June 25, 1971, by his original counsel, certain newspaper articles pertained to administrative proceedings with respect to his position as a faculty member of Ohio State University. Those articles indicate that Mr. Boyland, as well as Mr. Kunstler, represented the defendant during those proceedings, and that Mr. Kunstler departed from Columbus during the proceedings, leaving the defense primarily in the hands of Mr. Boyland. Although these newspaper articles constitute hearsay, they were submitted by defendant and, if correct, would indicate that Mr. Boyland had represented the defendant for approximately the same length of time that defendant contended Mr. Kunstler had, as would Mr. Boyland's initial representation of defendant in this case.

Defendant further relies upon *Spanos v. Skouras Theatres Corporation* (C. C. A. 2, 1966), 364 F. 2d 161, in support of his contention that he had a right of representation by an out-of-state attorney. That case does not so hold. First, that case involved an out-of-state attorney who sought to recover legal fees for legal advice and assistance given in connection with an antitrust suit in a New York federal court by an attorney not admitted to the bar of New York or of the federal court involved. No *pro hac vice* admission was involved, since the client discharged the attorney in that case, but the court of appeals stated that there was "not the slightest reason" to believe that such admission would have been denied. Thus, the issue before the court was whether the client could avoid

paying an out-of-state attorney whom he had employed over a period of five years for legal advice and assistance in connection with an antitrust suit, solely upon the grounds that such out-of-state attorney was not licensed to practice law in the jurisdiction involved. A holding that, under such circumstances, the client could not escape responsibility for paying the out-of-state attorney for legal advice and assistance in connection with litigation in federal court, hardly constitutes authority for the proposition that there is a constitutional right to employ out-of-state attorneys to defend a resident of a state on state criminal charges pending in a state court of which the defendant is a resident.

There is, in *Spanos*, certain dictum which can be quoted out of context, to support defendant's position, such as that contained at page 170:

"In an age of increased specialization and high mobility of the bar, this must comprehend the right to bring to the assistance of an attorney admitted in the resident state a lawyer licensed by 'public act' of any other state who is thought best fitted for the task, and to allow him to serve in whatever manner is most effective, subject only to valid rules of courts as to practice before them."

The circuit court of appeals also stated, at 170, that "under the privileges and immunities clause of the constitution, no state can prohibit a citizen with a thorough claim or defense, from engaging an out-of-state lawyer to collaborate with an in-state lawyer and give legal advice concerning it within the state." Even assuming this to be a correct statement of the law, and applicable in the instant case, there was nothing in the trial court's order refusing Mr. Kunstler *pro hac vice* admission to conduct the trial of the case which prevented him from collaborating with defendant's Ohio lawyers and giving legal advice concerning any possible federal defense that could be asserted therein. Defendant's Ohio lawyers were free

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to consult with Mr. Kunstler and seek legal advice from him respecting trial strategy and procedure.

Considering all the attendant circumstances, we find that Judge Reda did not abuse his discretion in denying the request for *pro hac vice* admission of Mr. Kunstler.

Defendant further relies upon the case of *Argersinger v. Hamlin* (1972), 92 S. Ct. 2006, decided June 12, 1972. Even if that case were applicable, it would relate only to one of the three affidavits involved, since only a fine was imposed as a penalty with respect to the other two. Only in case number 13205 in the trial court was imprisonment imposed as a penalty. The United States Supreme Court expressly held that its decision in *Argersinger* was limited to situations where imprisonment is imposed, stating: "We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor or felony, unless he was represented by counsel at his trial."

Such a waiver is present in the instant case, with regard to representation by counsel. Defendant elected not to be represented by local counsel at his trial unless Mr. Kunstler also could participate in the trial. Defendant knowingly and intelligently waived his right to representation by counsel, choosing instead to rely upon his claim that he had a right to be represented by counsel not admitted to practice in Ohio. Defendant chose to take his chances of being successful upon that issue on appeal, rather than to be represented by counsel at his trial. Since we find that defendant's contentions in this regard are without merit, and that the trial court did not abuse its discretion, the defendant cannot be heard to complain because he was not represented by Ohio counsel at his trial.

Furthermore, defendant on March 16, 1972, filed a motion in the trial court seeking *pro hac vice* admission of Mr. Kunstler and permission for defendant to represent

himself as co-counsel. While that motion provides space for signatures by the defendant and Mr. Twohig, as well as Mr. Kunstler, it is signed only by Mr. Kunstler. Significantly, it states in part:

"3. A critical part of Professor Ross' case is an examination of the political motivations of some prosecution fitnesses in order to establish their lack of credibility.

"4. The direct opposition of those motivations to the political philosophies of Professor Ross was the direct cause of his arrest.

"5. This inquiry into political motives requires that counsel has the fullest and most direct comprehension of Professor Ross' political philosophy, past activities and the reports of these activities.

"6. Attorneys for Professor Ross confess their inability to fully and adequately conduct that inquiry, and represent that Professor Ross is best qualified to do so."

By signing this application, Mr. Kunstler represented to the court his "inability to fully and adequately conduct that inquiry." At trial, the defendant did not conduct that inquiry which, it was represented, he was "best qualified to do."

The first assignment of error is not well taken.

Likewise, the second assignment of error is not well taken. The record is clear that Judge Reda reviewed all of the various motions filed by defendant, and ruled on them. Judge Reda's original decision on the various motions filed by defendant appears in the record as document No. 50. In that decision, Judge Reda enumerates the various motions filed by defendant. Judge Reda, at that time, stated: "I have examined all of the motions and a lengthy memoranda submitted by both parties and see no good reasons for disturbing the decision of Judge Fais in any way." Judge Reda reiterated his position prior to trial on July 10th, stating:

"Mr. Twohig, I indicated to you on Friday, last Friday at 9 o'clock, what I had done was I had read all of the motions, I had read the memoranda that was submitted by you and by the attorney for the State of Ohio. I indicated that some of the motions that you filed involved issues that directed themselves to application of substantive law, * * * That your other motions directed themselves to the issues that pertained to discretion of the Court. * * * And I indicated that I did not find any error in the application of the substantive law with regard to your motions by Judge Fais.

"And I also indicated that as far as those motions that had to do with an exercise of the discretion of the court, that I would not disturb them. * * *

"So what I indicated to you was that I concur with Judge Fais not only in his rulings as far as substantive law is concerned, but I concurred with Judge Fais also in those matters where he has exercised his discretion."

It is true that Judge Reda did state subsequently: "It's my feeling that where a judge of this court has ruled upon a substantive matter of law, that it would be highly improper for another judge of this court to substitute his judgment for the judgment of Judge Fais."

It will be noted that Judge Reda clearly limited the application of this philosophy to issues of substantive law. As to discretionary matters, he clearly indicated that he exercised his own independent discretion, although concurring with Judge Fais. As to the discretionary matters, especially the matter of representation by out-of-state counsel, Judge Reda devoted a considerable amount of time to a consideration of the issues, and permitted extensive arguments and hearings thereon.

Even assuming that Judge Reda did not fully consider the issues of substantive law involved, and that this constituted error, it would not be prejudicial error, unless the rulings on such issues of substantive law were errone-

ous. Defendant, with one exception, makes no contention herein that any of the rulings were erroneous, and, with the one exception, makes no assignment of error with respect to any of the rulings upon the motions involving issues of substantive law. Likewise, the only issue raised independently by defendant, with respect to the discretionary matters, is that involving representation by out-of-state counsel. The record is quite clear that Judge Reda exercised his own independent judgment in that matter. The only substantive law issue raised by defendant is that raised by the third assignment of error.

Judge Reda made an independent review of all the motions filed by defendant. He clearly stated that he concurred in the rulings previously made and found no error in those involving substantive law. Defendant has not demonstrated, or even raised the issue, except in the one instance, that any of the rulings involving issues of substantive law were erroneous. As to all discretionary matters, Judge Reda exercised his own discretion, and defendant has not demonstrated any abuse of that discretion. Accordingly, there is no prejudicial error in the manner in which Judge Reda considered the various motions. In fact, we find no error in the manner in which he did consider them. Judge Reda did not merely adopt all of the rulings previously made by Judge Fais. Rather, Judge Reda reviewed all of the motions and the memoranda submitted in support and in opposition thereto. The record clearly indicates that he was fully conversant with the motions and the issues raised thereby. There is no indication that the rulings would have been different had they not first have been ruled upon by Judge Fais. On the contrary, Judge Reda expressly stated that he concurred in all of the prior rulings. In fact, it is not at all clear from the record or from the argument in this court, exactly what defendant wished Judge Reda to do

in addition. Defendant, in his brief herein, states that, "Judge Reda committed unquestionable error by allowing those rulings to stand." However, the record is clear that Judge Reda did not "allow" previous rulings to stand but, rather, reviewed all of the motions and made his own rulings thereon, which were the same in result as the previous rulings.

By his third assignment of error, defendant contends that his arrest was illegal, contending that he was arrested by the director of public safety and that the director of public safety has no power of arrest. The record indicates that, although the words involved may have been spoken by the director of public safety, the actual physical arrest was made by a police officer, apparently acting under the direction of the director of public safety, his superior.

Defendant contends that his arrest was illegal and that, therefore, the charges against him should be dismissed. However, in *State v. Hooper* (1966), 10 Ohio App. 2d 229, the second paragraph of the syllabus states:

"An illegal arrest does not, in itself, invalidate an affidavit filed in a misdemeanor case and is not a proper ground to sustain a motion to quash the affidavit." The United States Supreme Court denied *certiorari* in an appeal from this decision. See *Hooper v. Ohio*, 389 U. S. 923. Subsequently, the conviction was vacated by a United States district court upon other grounds, in a habeas corpus action. The defendant therein was again convicted, and his conviction was confirmed by the Ohio Supreme Court in *State v. Hooper*, 25 Ohio St. 2d 59.

Since the only contention defendant makes with respect to his claim that his arrest was illegal is that the charges against him should be dismissed, it is unnecessary to determine whether or not the director of public safety has the power to make an arrest. Even if he has

not, and the arrest was illegal, this does not constitute grounds for dismissal of the charges.

The third assignment of error is not well taken.

By his fourth assignment of error, defendant contends that his conviction upon the charge of failing to depart after being told to do so is invalid because the affidavit indicates the name of the agent of the school, so ordering defendant, to be "Bruce P. Hennick," whereas the evidence indicates the name of the person so ordering to be the principal of the school, Duane Reed.

Defendant was charged with neglecting or refusing to depart from Linden-McKinley High School after being notified to do so by the agent, or servant, of the owner or occupant thereof, in violation of R. C. 2909.21. An affidavit charging an offense under that section obviously need not specify the name of the agent, or servant, of the owner or occupant who notified the accused to depart from the premises. In other words, had the affidavit omitted entirely any reference to the name of the servant of the school actually ordering the accused to depart, there would be no issue as to the validity of the affidavit. The issue, thus, is whether the insertion of an incorrect name in the affidavit nullifies the conviction upon the charge. The state relies upon R. C. 2941.26, which reads as follows:

"When, on the trial of an indictment or information, there appears to be a variance between the statement in such indictment or information and the evidence offered in proof thereof, in the Christian name or surname, or other description of a person therein named or described, or in the name or description of a matter or thing therein named or described, such variance is not ground for an acquittal of the defendant unless the court before which the trial is had finds that such variance is material to the

merits of the case or may be prejudicial to the defendant."

While that section refers to indictments or informations, it is made applicable to prosecutions for misdemeanors by affidavit by R. C. 2941.35. See *State v. Walker*, 20 Ohio App. 2d 179.

Furthermore, R. C. 2941.30 provides that:

"The court may at any time before, during, or after a trial amend the indictment, information, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. * * *"

That section also is made applicable to misdemeanors being prosecuted by affidavit by R. C. 2941.35. See *State v. Walker, supra.*

While R. C. 2941.30 does provide that the accused may be entitled to a continuance where an amendment is necessary to cure a variance between the affidavit and the proof, unless the defendant was not misled or prejudiced by the variance, this issue was not raised in the trial court and is being raised by defendant for the first time on appeal. R. C. 2941.30 provides, further "No action of the court in refusing a continuance or postponement under this section is reviewable except after motion to and refusal by the trial court to grant a new trial therefor." That section also provides that there shall be no reversal unless "the reviewing court finds that the accused was prejudiced in his defense or that a failure of justice resulted." In view of the fact that the defendant elected to make no defense but, rather, to rely solely upon his contention that he was entitled to be represented by the out-of-state attorney, Mr. Kunstler, he obviously was not prejudiced in his defense. Defendant has not demon-

strated that a failure of justice has resulted from the variance.

The variance does not constitute a change in the name or identity of the crime charged. Defendant was charged with failing to depart after being ordered to do so. The variance was in the name of the person giving the order, not in the identity of the crime. See *Stewart v. Alvis*, 90 Ohio App. 377; and *State v. Dye* (1968), 14 Ohio App. 2d 7.

We do not feel that the fact that the affidavit was not actually amended requires a different conclusion, inasmuch as the issue was not raised in the trial court. It would have been proper for the trial court to allow the amendment, and had the issue been raised therein, the trial court could have corrected the affidavit to conform to the evidence. R. C. 2941.30, *supra*, expressly provides that such an amendment may be made after trial.

More controlling is R. C. 2945.83 which provides:

"No motion for a new trial shall be granted or verdict set aside, nor shall any judgment of conviction be reversed in any court because of:

"(A) An inaccuracy or imperfection in the indictment, information, or warrant, provided that the charge is sufficient to fairly and reasonably inform the accused of the nature and cause of the accusation against him:

"(B) A variance between the allegations and the proof thereof unless the accused is misled or prejudiced thereby;

"* * *

"(E) Any other cause unless it appears affirmatively from the record that the accused was prejudiced thereby or was prevented from having a fair trial."

It does not affirmatively appear from the record that the defendant was prejudiced or prevented from having

a fair trial by either the variance in the proof from the affidavit or the failure of the prosecution to amend the affidavit at trial. Likewise, it does not appear that the variance between the allegations of the affidavit, and the proof, in the name of the person who gave the order to defendant to depart, misled the accused or prejudiced him, in view of the fact that he offered no defense but, rather, chose to rely solely upon his contention that he had an absolute right to be represented by the out-of-state attorney, Mr. Kunstler. Accordingly, the fourth assignment of error is not well taken.

Inasmuch as the only errors urged by defendant are the four assignments of error which we have considered, the judgment of the trial court must be affirmed.

For the foregoing reasons, the four assignments of error are overruled, and the judgment of the Franklin County Municipal Court is affirmed.

Judgment affirmed.

STRAUSBAUGH and REILLY, JJ., concur.

IN THE COURT OF COMMON PLEAS
OF FRANKLIN COUNTY, OHIO

Case No. 72 CV-07-2121

In The Matter Of

CHARLES O. ROSS,

Affidavit of Prejudice
Against

JUDGE GERVAIS FAIS

DECISION and JOURNAL ENTRY

Rendered this 6th day of July, 1972.

Williams, J.

On or about April 6, 1972, Charles O. Ross, defendant in cases number 13205, 13211 and 13212, Franklin County Municipal Court, filed his Affidavit of Prejudice against Judge Fais, then presiding over said cases. This affidavit, together with accompanying memoranda and exhibits were presented to Judge Myron B. Gessaman, Presiding Judge of the Franklin County Court of Common Pleas, in accordance with Section 2937.20, Revised Code for ruling. 2937.20, Revised Code, reads as follows:

> "When a magistrate or a judge of a court inferior to the court of common pleas is interested in a cause pending before him, or is related to or has a bias or prejudice either for or against a party to such cause or to his counsel, or is otherwise disqualified to sit in such cause, on the filing of an affidavit of such party or his counsel, setting forth the fact of such interest, relationship, bias, prejudice, or disqualification, the clerk of such court, or such magistrate,

shall enter the filing of such affidavit on the docket in said cause, and, forthwith notify the presiding "judge, or the chief justice of the court of common pleas, or if there is no such officer, then a judge of the court of common pleas of such county, who shall proceed without delay to examine into said affidavit, and if he finds from all the evidence that such interest, relationship, bias, prejudice, or disqualification exists, he shall designate another magistrate of the township or county, or another judge of said court or the court of common pleas to hear and determine said cause. The judge or magistrate so designated shall proceed to try such cause. Such affidavit must be filed not less than twenty-four hours before the time set for the hearing of said cause, unless such filing is unavoidably prevented.

"This section applies to criminal and civil proceedings."

Because of a pending action in the Federal Court to remove jurisdiction, Judge Gessaman did not rule upon the affidavit. Following a denial of the motion to transfer by the Federal Court, a Petition for Writs of Prohibition and Mandamus was filed in the Supreme Court of Ohio on June 30, 1972, case number 72-503. Among other things, this action seeks an order requiring the Common Pleas Court to assume jurisdiction and rule on a motion to disqualify Judge Fais.

Judge Gessaman is now in vacation and Judge Frederick T. Williams, Administrative Judge of the General Division, is hereby assuming jurisdiction to rule on the matter by virtue of Superintendency Rule 4, the cases' having been set for jury trial on their merits before the Municipal Court on July 10, 1972.

An examination of the various exhibits attached to the plaintiff's file in this matter indicate a considerable amount of notoriety insofar as the case, the judge, the

parties, and their counsel are concerned. It is extremely unfortunate that some cases are apparently tried at press conferences rather than in the court room.

Through various statements and allegations, both in court and outside the court, it would appear that Judge Fais has been goaded into making statements which, combined with his rulings on said motions might be construed as bias on his part against either the defendant or his attorneys.

Perhaps the best summation of the propriety of any judge sitting on a particular case may be found in *Haslam v. Morrison, Judge* 113 Utah 14, at page 20, and quoted in *State, Ex Rel. Pratt v. Weygandt, Chief Justice*, 164 O.S. 463, at page 471, reads as follows:

> "The purity and integrity of the judicial process ought to be protected against any taint of suspicion to the end that the public and litigants may have the highest confidence in the integrity and fairness of the courts. This is not to say that the mere filing of an affidavit of bias and prejudice, *ipso facto* casts such suspicion on the judge, and upon his integrity and fairness, that he ought to disqualify himself. However, it is ordinarily better for a judge to disqualify himself even though he may be entirely free of bias and prejudice if either litigant files an affidavit of bias and prejudice.
>
> " 'Next in importance to the duty of rendering a righteous judgment is that of doing it in such a manner as will beget no suspicion of the fairness or integrity of the judge.' "

In order to remove any suspicion as to the possibility of prejudice by Judge Fais, this court will disqualify him and appoint a successor Municipal Judge in accordance with Ohio Revised Code Section 2937.20.

Assignment of judges by lot is now required for Common Pleas judges by Superintendency Rule 4. This court

will, therefore, select by lot a judge of the Municipal Court to preside.

Inasmuch as there are eleven other judges, this court will cause their names to be placed on individual, identical slips of paper and Mr. William Boyland for the defense and Mr. Tommy Thompson of the offices of the Franklin County Prosecuting Attorney will draw slips alternately until each has drawn five and the remaining slip will contain the name of the judge who is being assigned. His name will be inserted in this Decision and Journal Entry before filing the same.

IT IS ORDERED that such matter be assigned a Civil Case Number by the clerk of the Franklin County Common Pleas Court and this Decision and Journal Entry be spread on the journals of this court.

IT IS FURTHER ORDERED that a copy of this Decision and Journal Entry be delivered forthwith to the Honorable C. William O'Neil, Chief Justice of the Ohio Supreme Court; the Honorable Gervais Fais, Judge of the Franklin County Municipal Court; and the Honorable Judge Frank A. Reda who has been selected by lot as hereinbefore prescribed, and who is hereby appointed to serve as judge in Case Numbers 13205, 13211 and 13212, and thereto, pending in the Franklin County Municipal Court.

FREDERICK T. WILLIAMS
Administrative Judge

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 1, 1973.

Before

HON. LUTHER M. SWYGERT, *Chief Judge*
HON. ROGER J. KILEY, *Circuit Judge*
HON. THOMAS E. FAIRCHILD, *Circuit Judge*

ARTHUR BANKS,
Petitioner,

No. 73-1332 *vs.*

HON. CALE J. HOLDER,
United States District Judge,
Respondent.

Original Petition for Writ of Mandamus. (TH 72 CR 47)

ORDER

On Petition for rehearing.

We noted in our order dated May 17, 1973, that the answer did not raise the question whether prejudice to the government's case or impairment of the orderly and fair administration of justice (in a broader sense than the infringement of the interests of the petitioner) arising from Mr. Kunstler's public statement, may have justified respondent's order denying Mr. Kunstler's application.

Surely that question was not explicitly raised. The transcript of the April 1 hearing makes it clear that the chief concern of respondent was possible prejudice to petitioner. The statements by Mr. Kunstler which were brought out at the hearing covered a considerable spectrum. A few,

concerning the merits of the controversy, were clearly improper when made publicly by an attorney for a party. Others were expressions of opinion on public matters which could not be subject to any legal restraint. Although the former, if believed by the public, would create opinion adverse to the government, respondent appeared to assume that they, as well as the latter, would irritate members of the public and thus create prejudice against the petitioner. Respondent's preoccupation with possible prejudice to the petitioner is evident from the portion of the finding quoted in our original order and also the following:

> "When petitioning attorney's conduct in the subject cause is reviewed in its entirety, the impact this must have upon potential jurors in the Terre Haute Division of the Court inevitably inures to the detriment of the defendant in the subject cause."

Much of the argument presented on motion for rehearing treats the broader issue, the task of balancing in this type of situation, the interest of the prosecution in obtaining a fair trial and the inherent right of the court to protect the public's interest in the orderly and fair administration of justice, on the one hand, against the defendant's sixth amendment right to counsel of his own choosing.

In considering the broader issue, we conclude that before a trial court may properly limit the defendant's right to a chosen counsel, there must be sufficiently supported and specific findings of fact that the conduct of the defendant's attorney creates a serious and imminent threat of "significant prejudice to the defendant himself" or of "disruption of the orderly processes of justice unreasonable under the circumstances of the particular case." *Magee* v. *Superior Court of City & County of San Francisco*, 8 Cal. 3rd 949, 506 P.2d 1023 (1973). See *Chase* v. *Robson*, 435 F.2d 1059 (7th Cir., 1970).

Because interference with the individual's choice of counsel should be kept to the necessary minimum, in each case the trial court must consider carefully whether a less drastic alternative, such as a narrow injunction limiting particular kinds of public statements, would suffice to protect the other interests at stake. Of course, to the extent that the defendant knowingly and intelligently endorses the conduct of his attorney in making speeches and press releases, he waives his right to claim that he has been denied his sixth amendment right to a fair and impartial trial.

The findings of respondent in this case clearly did not meet this standard. Our independent review of the record reveals that the hearing did not include this broader issue within its focus, and that the evidence with respect to the statements which could be deemed improper would not support such a conclusion.

Petition for rehearing is denied.

Supreme Court, U. S.
FILED
SEP 23 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-63

CHARLES O. ROSS,

Petitioner,

v.

HONORABLE FRANK REDA,
Judge, Franklin County Municipal Court,

Respondent.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-63

CHARLES O. ROSS,
Petitioner,

v.

HONORABLE FRANK REDA,
Judge, Franklin County Municipal Court,
Respondent.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

A. BRIEF IN OPPOSITION

Pursuant to Rule 24 of this court, respondent moves this court to deny the petition for certiorari to the Court of Appeals for the Sixth Circuit, on the ground that it is manifest that the questions on which the decision for the cause depends are so unsubstantial as to need no further argument.

B. REASONS WHY THE QUESTIONS ON WHICH THE DECISION OF THE CAUSE DEPENDS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

1. Permission for an out-of-state attorney to appear pro hac vice in an action pending in a state court is a privilege, not a right.

2. Before a federal court can hear a habeas corpus claim, petitioner must have exhausted his state remedies.
3. The rulings of a trial court, after reviewing a defendant's motions, are not tainted with bias merely because they are the same in result as those of a previous judge who was removed.
4. Pursuant to Title 28 USC, Section 2254 (b), a United States District Court is bound by a factual finding of a lower state court where such factual finding is relevant to a proceeding in habeas corpus. A United States District Court must apply federal constitutional principles to relevant factual determinations in ruling upon a petition for habeas corpus.

C. STATEMENT OF FACTS

On May 25, 1971, there were many agitating students and outsiders in Linden McKinley High School, a Columbus city school (T.R. 141). There was a complete breakdown of order (T.R. 142), resulting in an emergency situation (T.R. 153). Petitioner-appellant, hereinafter referred to as the petitioner, was in the school during this breakdown of order. In an effort to return order to the school it was decided to order the outsiders to leave the buildings. A principal at the school, Mr. Reed, made an announcement over the public address notifying all outsiders to leave the building and premises (T.R. 148).

After the announcement, the petitioner walked up to James J. Hughes, Jr., the City Safety Director, and stated: "Hughes, you started a riot here," Mr. Hughes, who was working with police and school personnel trying to calm the situation, turned his back to the petitioner and walked over to talk with a Columbus police officer, Major Smith (T.R. 149). The petitioner then

planted himself between Mr. Hughes and Major Smith so that they could not carry on a discussion. At that time, Mr. Hughes turned to Mr. Ross and said to him, "You have been ordered by the principal to leave the school." (T.R. 151). The petitioner then began a long harangue speech concerning his rights and stated he would not leave. At that time, Mr. Hughes told the petitioner, "You know the principal has ordered you out. Now, I'm ordering you out. You are to leave the building or you are going to be arrested for trespassing and failure to depart." (T.R. 151). The petitioner then resumed his speech concerning his rights, ending with the statement, "You can't make me leave." (T.R. 151). Mr. Hughes then stated, "you've got two minutes to get out of here or you're going to be arrested." The petitioner stated that he would not leave and began his speech again. He was removed from the building by two uniformed officers, and in turn transported to the Columbus Police Station.

While at the police station, the petitioner assaulted Richard Dimel while Mr. Dimel was attempting to take the petitioner's fingerprints. The petitioner accomplished this assault by balling up his fist, and stepping back to strike Mr. Dimel. (T.R. 171).

The petitioner was represented by several attorneys during the case. Bruce Campbell and William Boyland who initially appeared on behalf of the petitioner were later joined by Raymond Twohig. William Kunstler, who is not admitted to practice in Ohio, applied to the court for permission to represent the petitioner, which was denied. While in court asking for permission to appear pro hac vice, Mr. Kunstler refused to be seated when instructed to do so by the court. After repeated requests, Mr. Kunstler did sit down, saying he was doing

this not out of any respect for the court, but only because the court had the power to force him to sit down.

After the initial refusal to admit Kunstler by Judge Gervias Fais, Mr. Kunstler made the following statement concerning the refusal at a rally for the petitioner in front of the Columbus City Hall:

> Judge Fais wouldn't let Mr. Ross have a courtroom; he wouldn't let Mr. Ross have a lawyer—You know what I say to Judge Fais, fuck him!

During a hearing on a motion to admit Mr. Kunstler pro hac vice, Mr. Kunstler informed the trial judge, Judge Reda, that:

> "I would never promise Your Honor that I would not speak outside. I will speak outside, because I think to bind me would be unconstitutional and would make attorneys have different First Amendment rights than anybody else. . ."

The trial judge for this case, Judge Frank A. Reda, reviewed all of the motions that had been filed on behalf of petitioner by his attorneys, Campbell, Boyland and Twohig. Judge Reda stated that he concurred with the prior decisions in the case, and therefore, did not disturb them. (T.R. 6).

On the day of trial, the petitioner told Judge Reda that he had discharged Mr. Campbell, Mr. Boyland and Mr. Twohig, and asked that the case be continued. Judge Reda then changed his ruling on the motion filed by the petitioner to be his own counsel in this case; permitting the petitioner to represent himself.

During the trial, Mr. Twohig was in the court room (T.R. 154), conferred with the petitioner at every recess (T.R. 159), and passed notes to the petitioner through the petitioner's wife. Mr. Twohig remained the petitioner's

attorney throughout the trial despite petitioner's initial statement that the attorney had been discharged. Mr. Twohig filed papers for the petitioner in a federal court in Cincinnati (T.R. 178). When asked by Judge Reda during the trial who his attorney was in the federal case, the petitioner replied that Mr. Twohig was representing him (T.R. 180).

After the proceedings in the Franklin County Municipal Court, the case was appealed to the Franklin County Court of Appeals. That court issued a decision that Mr. Kunstler's response to Judge Reda that he would never promise not to speak outside the court room amounted to a refusal on his part to abide by Canon 7 of the Rules of Ethics adopted by the Supreme Court of Ohio. The Court of Appeals affirmed the lower court proceedings.

The case was next appealed to the Ohio Supreme Court. The Supreme Court refused to accept jurisdiction of the case.

The case was then appealed to the United States Supreme Court. The United States Supreme Court refused to grant certiorari in the case, and the case was returned to the Franklin County Municipal Court for execution of the sentence.

Prior to the execution of the sentence a petition for a writ of habeas corpus was filed in the United States District Court for the Southern District of Ohio, Eastern Division. The United States District Court judge denied the petition for a writ of habeas corpus based in part on his acceptance of factual determinations by the state courts which had previously made determinations in this matter.

The Sixth Circuit Court of Appeals affirmed the judgment of the United States District Court.

D. PERMISSION FOR AN OUT-OF-STATE ATTORNEY TO APPEAR PRO HAC VICE IN AN ACTION PENDING IN A STATE COURT IS A PRIVILEGE, NOT A RIGHT.

Petitioner argues that he has a right emanating from the Sixth Amendment to the United States Constitution to be represented by an attorney not admitted to practice in Ohio if that attorney is the representative of his choice. He argues that such a rule is appropriate in his case because he is asserting general constitutional claims which require for their vindication the skills of a "political trial specialist." Petitioner is arguing, in effect, that whenever a federal constitutional claim is asserted which the petitioner wishes to characterize as "political", his choice of counsel must supersede any local interest in regulating the practice of law by out-of-state attorneys.

The petitioner's contention is legally unsound for two reasons. First, no count, either federal or state, has ever interpreted the scope of the right to counsel in state courts this broadly; in fact, the United States Supreme Court has consistently denied certiorari in cases presenting the same question as is raised by petitioner in this matter. Second, the effect of accepting petitioner's argument would be to shift the discretion to limit appearances by out-of-state counsel which is now vested in state courts to the defendants who are being tried in those courts.

The claim of petitioner that his out-of-state attorney was necessary to present his so-called "political" defense is particularly bizarre in view of a motion which was signed by the petitioner requesting that he be permitted to act as his own counsel during the trial because:

> "* * *
> "3. A critical part of Professor Ross' case is an examination of the political motivations of some prosecution witnesses in order to establish their lack of credibility.
> "4. The direct opposition of those motivations to the political philosophies of Professor Ross was the direct cause of his arrest.
> "5. This inquiry into political motives requires that counsel has the fullest and most direct comprehension of Professor Ross' political philosophy, past activities and the reports of these activities.
> "6. Attorneys for Professor Ross confess their inability to fully and adequately conduct that inquiry, and represent that Professor Ross is best qualified to do so.
> * * *" (Court of Appeals decision—Page 638.)

The foregoing application was signed by Mr. Kunstler, thus representing to the court that Mr. Kunstler was unable to present the delicate political questions that petitioner now claims were involved in the case. During the trial, the trial judge ruled on the motion to permit the petitioner to represent himself during the trial; this ruling was to the effect that petitioner could represent himself during the trial. Significantly, petitioner raised no questions during the trial in any area. Now, petitioner represents to this court that he was unsuited to conduct his defense, and his defense could only have been successfully presented by a so-called "political trial specialist."

Petitioner filled the pages of his brief with many cases having no application to the proposition he presents. Among those cases are the following: In Re Mandell, 69 F 2d 830 (2d Cir. 1934); Powell v. Alabama, 287 US 45 (1932); Glasser v. United States, 315 US 60 (1942); People v. Price, 262 NY 410, 187 N.E. 298 (1933); State v. Long, 19 Ga. App. 82, 166 S. E. 2d 365 (1969); Backer v. Commissioner of Internal Revenue, 275 F 2d 141 (5th Cir. 1960); Reynolds v. Cochran, 363 U.S. 801, and 363 U. S. 824 (1960); misc. orders; Chandler v. Fretag, 348 U.S. 3 (1954); Smith v. United States, 288 F 2d 259

(D.C. Cir. 1923); Walker v. State, 194 Ga. 727, 22 S.E. 2d 462 (1942); People v. Shiffman, 350 Ill. 243, 182 N.E. 760 (1932); Richardson v. State, 288 S.W. 2d 500 (Tex. App. 1956); Kerling v. G. W. VanDusen & Co., 109 Minn. 481, 124 N.W. 235 (1910); Burnham v. Brush, 176 Misc. 29, 26 N.Y.S. 2d 397 (1941); People v. Crovedi, 53 Cal. Rptr. 284, 417 P 2d 868 (1966); Chivers v. State, 5 Ga. App. 654, 63 S.E. 703 (1909). None of these cases raises the question of whether the scope of petitioner's right to counsel includes the right to choose an attorney not authorized to practice in the courts of the state where the defendant is being tried. Thus, these cases do not apply to the question at bar.

Petitioner argues that the case of *United States v. Seale*, 471 F 2d 345 (7th Cir. 1972), should apply here. In that case the defendant was being tried in a federal court. Lead counsel was unavailable because of illness, and the presiding judge ordered the trial to proceed without him. The question of counsel's out-of-district status was never raised in that case. Moreover, the 7th Circuit did not raise defendant's choice of counsel to the level of unequivocal right, but merely stated that it "deserves consideration". 461 F 2d 345, 358.

The broad question of whether states are "entirely free to regulate the practice of law in any way they see fit," is not disputed here. Respondent fully concurs with the authorities petitioner cites in his discussion of this proposition. In Re Stolar, 401 U.S. 23 (1971); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); National Association for the Advancement of Colored People v. Button, 371 U.S. 451 (1963).

Some cases cited by petitioner do involve disputes over an appearance by out-of-state counsel; however, these cases are factually and legally distinguishable from the

case at bar. The case of *Lefton v. City of Hattiesburg*, 333 F 2d 280 (5th Cir. 1964), involved the removal of certain civil rights prosecutions from a state court in Mississippi to a federal district court. The court concluded that a local rule requiring that removal petitions be signed by a member of the local bar should be waived, or admission granted pro hac vice, where local counsel could not be obtained. The court's decision turned on the unavailability of local counsel, a problem which was not encountered in the present case. The case of *Sanders v. Russell*, 401 F 2d 241 (5th Cir. 1968), was also a case brought under federal civil rights laws in a federal court. The 5th Circuit in a decision, which relies heavily on their decision in *Lefton*, supra, expressly distinguished their holding in that case from situations like the one presented here:

> The petitioners' position is simply that they have a federal right to retain counsel of their choice who are attorneys in good standing at their respective bars and are associated with locally-admitted counsel in non-fee generating school desegregation cases in federal court. . . . This case does not involve the right to practice in state court. 401 F 2d 241, 244.

The case of *United States v. Bergamo*, 154 F 2d 31 (3rd Cir. 1946), also involved an action in federal court. That court stated that it was not deciding the issue of whether out-of-district counsel may be required to associate a local member of the bar. It seems fair to infer from that language that the court was also not deciding whether defendants in state courts had a right to retain out-of-state counsel. In addition, the *Bergamo* holding was expressly limited to federal courts by the case of *Cooper v. Hutchinson*, 184 F 2d 119, 122 (3rd Cir. 1950).

The case of *Spanos vs. Skouras Theatres Corp.*, 364 F 2d 161 (2d Cir. 1966), cert. denied 385 U.S. 987 (1966), was a civil suit instituted in federal court by an out-of-state attorney against a client for whom he had rendered his services over a period of five years as an anti-trust specialist. This case, which was decided under the privileges and immunities clause and *not* the Sixth Amendment, held that a contract for the out-of-state attorney's services was not unenforceable as an illegal bargain. Because the court tied its holding to the assertion of a federal claim, petitioner contends that a right to retain out-of-state counsel exists whenever a federal claim is asserted. This interpretation has been criticized:

> "So applied the court's decision could be utilized to invalidate any state rule of practice, the enforcement of which might hinder or prevent the vindication of a federally created right. With no narrower criterion than the 'necessary and appropriate' standard of Spanos, statutes of limitations, local pleading and discovery rules, or requirements of security for costs, could fall whenever a federal cause of action is asserted." Note, Retaining Out-of-State Counsel: The Evolution of a Federal Right, 67 Colum. L. Rev. 731, 744 (1967).

Cooper v. Hutchinson, supra, deals with out-of-state counsel in a state court. *Cooper* was a capital case where out-of-state counsel was granted admission pro hac vice, participated at length in the proceedings, and then was dismissed without cause. The court clearly recognized that the initial decision to admit an out-of-state attorney is "to be in the sound discretion of the court", but held that once he is so admitted, he cannot be disqualified from that particular case, except upon a showing of substantial cause. 184 F 2d 119, 723. Petitioner asserts that his representation by Mr. Kunstler in several previous proceedings justified applying the *Cooper* holding to this case. Such an interpretation is illogical because it was the initial decision to admit counsel and his familiarity with the particular case which triggered defendant's Sixth Amendment right in *Cooper*. Moreover, the *Cooper* court described as "startling" the suggestion that the courts of the states are bound to permit out-of-state attorneys to practice before them. 184 F 2d 119, 122.

Numerous authorities have held that permission to retain an attorney not admitted to practice in a jurisdiction is not a right but a privilege.

> It is well settled that permission to a nonresident attorney, who has not been admitted to practice in a court, to appear pro hac vice in a case there pending is not a right but a privilege, the granting of which is a matter of grace resting in the sound discretion of the presiding judge. *Thomas v. Cassidy*, 249 F 2d 91, 92 (4th Cir. 1957), cert. denied 355 U.S. 958 (1958).

The court in *Thomas*, which felt the question merited no more than a per curiam opinion, expressed "grave doubt" as to whether denial of the privilege to appear pro hac vice was even reviewable. See People of the State of New York v. Epton, 248 F. Supp. 276 (S.D.N.Y. 1965); Parker v. Parker, 97 So. 2d 136 (Dist. Ct. App. Fla. 1957).

The Supreme Court of the United States has never dealt with the specific question presented here except to deny certiorari, but has recognized that the control of the practice of law is vested in the courts of each jurisdiction. *Cohen v. Hurley*, 366 U.S. 117, 123-124 (1961). Relying partly upon the *Cohen* decision, the Supreme Court of New Jersey decided a question virtually identical to

the case at bar. That court held that no constitutional right to select an attorney who was not a member of the New Jersey bar exists as long as there is a member of the local bar who is "able, willing and free to provide effective counsel". *State v. Kavanaugh*, 52 N.J. 7, 18, 243 A. 2d 225 (1968), cert. denied 393 U.S. 924 (1968).

The question of representation by an out-of-state attorney in a state court as being subject to the discretion of the bar of that state has been raised before the Supreme Court of the United States in the past, and the court has consistently refused to hear such cases. Consistent with the foregoing, when the instant case appeared before the United States Supreme Court, the United States Supreme Court refused to grant certiorari.

E. BEFORE A FEDERAL COURT CAN HEAR A HABEAS CORPUS CLAIM, PETITIONER MUST HAVE EXHAUSTED HIS STATE REMEDIES.

One page 4. of his petition for writ of certiorari, petitioner in his questions presented for review raises two questions not heretofore raised at any level in his appeals. Questions 2. and 3. present new and novel arguments that were definitely not raised in state court proceedings in the prior appeals from the Ohio Court of Appeals and the Ohio Supreme Court which subsequently reached this court in a prior case, which was Case No. A-554.

28 USC, Section 2254 (1973), provides in relevant part:

> 2254. State custody-Remedies in Federal courts-(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody of

> violation of the Constitution or laws or treaties of the United States.
>
> (b) *An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State,* or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(Emphasis Added.) Accordingly, the case law has unanimously held that "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity of the state courts to correct a constitutional violation." *Darr v. Buford*, 339 U.S. 200, 204 (1950) [overruled in other respects, *Fay v. Doia*, 372 U.S. 391, 435-36 (1963)]. *See also, Nelson v. George*, 399 U.S. 224, 229 (1970); *Irvin v. Dowd*, 359 U.S. 394, 404-05, (1959); *Dombrowski v. Johnson*, 488 F. 2d 68 (6th Cir. 1973); *Albertson v. Johnson*, 440 F. 2d 1201 (6th Cir 1971). Indeed §2254 merely reflects a policy of federal-state comity. *See Fay v. Doia, supra*, 372 U.S. at 419-20.

In relation to the present case, the exhaustion requirement means not only that petitioner must have attempted vindication of some claims relating to his conviction in state court, but that the precise claims presented on habeas corpus have been passed upon by a state appellate body. This is the precise conclusion of the Supreme Court

in the 8-1 holding of *Picard v. Connor*, 404 U.S. 270 (1971).

In *Picard*, a state prisoner sought reversal of his conviction in state court on the ground that the procedures used to amend the indictment by which he was prosecuted were not in compliance with state law. Moreover, on federal habeas corpus, petitioner appended the new argument that such procedure also denied him equal protection of the laws under the fourteenth amendment. The Supreme Court held that he had not exhausted his state remedies because the state court had not had an opportunity to hear the federal claim:

> We emphasize that the federal claim must be fairly presented to the state courts. If the exhaustion doctrine is to prevent "unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution," Ex parte Royall, supra, at 251, 29 L Ed 871, *it is not sufficient merely that the federal habeas applicant has been through the state courts. The rule would serve no purpose if it could be satisfied by raising one claim in the state courts and another in the federal courts.* Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of the exhaustion of state remedies. According, we have required a state prisoner to present the state courts with the same claim he urges upon the federal courts. See Darr v Burford, supra, at 203, 94 L Ed at 766; Davis v Burke, 179 US 399, 401-403, 45 L Ed 249, 250, 251. 21 S Ct 210 (1900).
>
> * * * *
>
> We are thus unable to agree with that court that respondent provided the Massachusetts "court with 'an opportunity to apply controlling legal principles to the facts bearing upon [his] constitutional claim.'" 434 F2d, at 674. *To be sure, respondent presented all*

> *the facts. Yet the constitutional claim the Court of Appeals found inherent in those facts was never brought to the attention of the state courts.* The Supreme Judicial Court dealt with the arguments respondent offered; *we cannot fault that court for failing also to consider sua sponte* whether the indictment procedure denied respondent equal protection of the laws.

404 U.S. at 275-77. (emphasis added).

Conceivably, the present situation presents a much stronger basis for the application of this rule, for in *Picard* the petitioner, at the state level, *did* make a claim that at least "resembled" the equal protection grounds sought on habeas corpus. Mr. Justice Doublas, in his dissent, stressed this particular factor:

> He raised in his brief before the Supreme Judicial Court of Massachusetts his claim that such a substitution denied him that quantum of due process required by the Fourteenth Amendment "in that he was put to trial without having been indicted by a Grand Jury." He did not refer to the Equal Protection Clause which is also a part of the Fourteenth Amendment. But that is a nicety irrelevant to the maintenance.

404 U.S. at 278-79. With the conclusion of *Picard* standing in the face of this objection so must it stand in the present circumstances.

Picard has not been overruled. While the Supreme Court in the past few years has not sought to re-establish its standards [that is, it has been cited only a few times in passing reference], the opinion has not been criticized by either the Court or any of the court of appeals. To the contrary, the circuit courts have faithfully obeyed its mandates without reservation. *See e.g., Nelson v. Moore*, 470 F.2d 1192, 1197 (1st Cir. 1972); *United States v.*

Zelker, 496 F.2d 991 (2nd Cir. 1974); *United States ex rel Hayward v. Johnson;* 508 F.2d 322, 330 (3rd Cir. 1975); *Saunders v. Cox,* 470 F.2d 734, 736 (4th Cir. 1972); *Minaffe v. Estelle,* 491 F.2d 1096 (5th Cir. 1974); *Macon v. Lask,* 458 F.2d 942, 948 (7th Cir. 1972); *Smith v. Wolff,* 506 F.2d 556, 558 (8th Cir. 1974), *Williams v. Hocker,* 463 F.2d 234, 235 (9th Cir. 1972); *Ramirez v. Rodriguez,* 467 F.2d 822, 823 (10th Cir. 1972).

F. THE RULINGS OF A TRIAL COURT, AFTER REVIEWING A DEFENDANT'S MOTIONS, ARE NOT TAINTED WITH BIAS MERELY BECAUSE THEY ARE THE SAME IN RESULT AS THOSE OF A PREVIOUS JUDGE WHO WAS REMOVED.

Petitioner argues that the taint of bias, imputed from the previously disqualified judge, must attach to the rulings of the trial judge in this case. He alleges that the record reveals a "hesitancy" on the part of the trial judge to "secondguess" the chief judge of his court. Furthermore, he argues that because Judge Reda's rulings were the same in result as rulings made by Judge Fais who was removed, they must be erroneous.

The case of *Tumey v. Ohio,* 273 U.S. 510 (1927), involved a trial in a mayor's court where the mayor only received remuneration when he convicted. The Supreme Court concluded that such a financial interest violates the due process rights of the defendant. Petitioner argues that *Tumey* and cases decided in similar situations should apply here. Clearly they do not. Judge Reda is an independently elected official, with a fixed salary, answerable only to the citizens of the community. The showing of "hesitancy" which petitioner infers from the record does not begin to approach the inherent bias of a pecuniary interest. Moreover, petitioner's insinuation of bias by association because Judge Fais is the chief judge of the court on which Judge Reda sits, must be rejected as a highly inappropriate assertion.

Petitioner relies heavily upon the probability that Judge Reda could not have fully considered all the motions presented to him during the time in which he reached his decisions. This probability combined with Judge Reda's statement that he concurred with the rulings of Judge Fais is sufficient cause for reversal of those rulings according to petitioner.

Speculation as to the mental processes of a trial judge has never been the standard applied when reviewing his rulings for error. The only workable standard to apply here is whether the rulings are clearly erroneous. Petitioner, except for two of the rulings, does not dispute them as matters of law. The two rulings which petitioner does dispute were appealed and argued at length in the Court of Appeals of Franklin County, Ohio, and are further argued in this brief. They were clearly not erroneous.

The arguments which petitioner advances to illustrate that Judge Reda's rulings are tainted with bias are based upon inference and conjecture. As such, their status as a showing of a violation of petitioner's due process rights is dubious at best.

G. PURSUANT TO TITLE 28 USC, Section 2254 (d), THE UNITED STATES DISTRICT COURT IS BOUND BY A FACTUAL FINDING OF A LOWER STATE COURT WHERE SUCH A FACTUAL FINDING IS RELEVANT TO A PROCEEDING IN HABEAS CORPUS. THE UNITED STATES DISTRICT COURT MUST APPLY FEDERAL CONSTITUTIONAL PRINCIPLES TO RELEVANT FACTUAL DETERMINATIONS IN RULING UPON A PETITION FOR HABEAS CORPUS.

In this case the federal district court judge did accept a factual determination by a lower state court; the judge then applied federal constitutional principles to this

factual determination, and then made its ruling on the petition for habeas corpus. Therefore, no error was committed by the United States District Court judge in this proceeding.

The instant case is very similar to the case of *Matthews v. Wingo* (1973 CA6 Ky), 474 F2d 1266, cert. den. 411 US 985, 36 LE2d 963, 93 SCt 2283, where this court approved a district court's acceptance of a state court's adjudication of the petitioner's competency.

The following facts were relied upon by the United States District Court in the prior habeas corpus proceeding that is now before this court. During a proceeding in the Franklin County Municipal Court on July 10, 1972, Judge Reda, a Franklin County Municipal Court judge, questioned Mr. Kunstler:

> I am concerned about your conduct outside the court room. I have never met you before, Mr. Kunstler, but I had reports about your conduct. Not only in this jurisdiction but also in other jurisdictions outside the court room.
>
> Now, do you have any statements that you would like to make to the court with respect to what you believe an attorney's conduct should be outside the court room?

Mr. Kunstler responded, in relevant part:

> Surely, Your Honor, I would be glad to. Outside of the court room I have every right to all the First Amendment privileges of any other person. [Mr. Kunstler then referred to *Chase v Robeson,* 435 F2d 1059 (7th Cir. 1970)] . . . They said in that case that unless you can show by an evidentiary hearing that there is a clear and present danger to the administration of justice, no court can bind a lawyer or his client from speaking in a criminal matter extrajudicial statements. This is the standard which I

> have now adopted for myself. I think it's the law of the land, and I think it's clear . . . So I would never promise Your Honor that I would not speak outside. I will speak outside, because I think to bind me would be unconstitutional and would make attorneys have different First Amendment rights than anybody else . . .

The above statement by Mr. Kunstler certainly fits within criteria set out in *Brown vs. Allen,* 344 US 443, at page 506, where the court stated:

> " 'By issues of fact' we mean to refer to what are termed basic, primary or historical facts; facts 'in the sense of a recital of external events and the credibility of their narrators' ".

The foregoing statement by Mr. Kunstler formed the background of facts which lead to the conclusion by the Court of Appeals of Franklin County, Ohio, that Mr. Kunstler would not comply with Canon 7 of the Code of Professional Responsibility as adopted by the Supreme Court of Ohio. Canon 7 in pertinent part reads as follows:

> "A goal of our legal system is that each party shall have his case, criminal or civil, adjudicated by an impartial tribunal. The attainment of this goal may be defeated by dissemination of news or comments which tend to influence judge or jury. Such news or comments may prevent prospective jurors from being impartial at the outset of the trial and may also interfere with the obligation of jurors to base their verdict solely upon the evidence admitted in the trial. The release by a lawyer of out-of-court statements regarding an anticipated or pending trial may improperly affect the impartiality of the tribunal. For these reasons, standards of permissible and prohibited conduct of a lawyer with respect to trial publicity have been established."

The disciplinary rules specifically deal with the question of trial publicity and DR 7-107 (B) provides as follows:

> "A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:
>
> (1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.
>
> (2) The possibility of a plea of guilty to the offense charged or to a lesser offense.
>
> (3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.
>
> (4) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.
>
> (5) The identity, testimony, or credibility of a prospective witness.
>
> (6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case."

DR 7-107 (B) does not preclude a lawyer during such period from announcing:

> (1) The name, age, residence, occupation, and family status of the accused.
>
> (2) If the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.
>
> (3) A request for assistance in obtaining evidence.
>
> (4) The identity of the victim of the crime.

> (5) The fact, time, and place of arrest, resistance, pursuit, and use of weapons.
>
> (6) The identity of investigating and arresting officers or agencies and the length of the investigation.
>
> (7) At the time of seizure, a description of the physical evidence seized, other than a confession, admission, or statement.
>
> (8) The nature, substance, or text of the charge.
>
> (9) Quotations from or references to public records of the court in the case.
>
> (10) The scheduling or result of any step in the judicial proceedings.
>
> (11) That the accused denies the charges made against him."

DR 7-107 (D) deals specifically with out-of-court statements during trial, and provides as follows:

> "During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote from or refer without comment to public records of the court in the case."

Based on the statement of Mr. Kunstler and upon an analysis of Canon 7, 'the Court of Appeals of Franklin County, Ohio, made the following ruling:

> From Mr. Kunstler's statement, the trial court was justified in conclusing that Mr. Kunstler would not comply with the standards established by Canon 7 of the Code of Professional Responsibility with re-

> spect to out-of-court statements but, rather, would only comply with the lesser standard of *Chase* [*v. Robeson*, 435 F 2d 1059 (7th Cir. 1970)] as he interpreted that standard to be. We find Canon 7 of the Code of Professional Responsibility, as recommended by the American Bar Association and adopted by the Supreme Court of Ohio, to be a constitutionally valid regulation of the conduct of attorneys with respect to out-of-ccurt statements concerning pending litigation. In fact, such canon would seem to be required by *Sheppard v. Maxwell*, (1966) 384 US 333 . . .

The factual statement made by Mr. Kunstler at the municipal court hearing amply supports the finding of the Court of Appeals of Franklin County. In ruling upon the petition for a writ of habeas corpus the United States district judge ruled that the record of the case supported the conclusion that Mr. Kunstler would not comply with Canon 7. The district court judge followed this finding by a recital of pertinent federal cases dealing with right to counsel and in page 11. of its decision made the following finding:

> "The assertion that a trial court has the unreviewable discretion to refuse to admit, *pro hac vice*, a criminal defendant's otherwise fully qualified counsel on the sole ground that he is not a member of the bar of the court's jurisdiction is untenable . . . "

It is apparent from the ruling of the United States District Court that he followed all procedures in a proper manner in making the foregoing ruling. He was bound to accept factual conclusions from lower state courts. He did this. He was further bound to apply federal constitutional standards to these factual determinations. He did this. Therefore, it is respectfully submitted that petitioner-appellant's first claim of error is not well taken.

CONCLUSION

Respondent respectfully submits that the petition for a writ of certiorari should be denied, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

With the exception of the two new issues raised by the petitioner in his petition, this total matter amounts simply to a review for a second time by this court of precisely the same issues raised by petitioner in his appeal during the October Term of 1973 in Case No. A-554. The court at that time declined to hear this case and no differences in persuasion have been offered as to why this court should not again decline to hear this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Affirm was duly mailed, postage prepaid, to the following attorneys for petitioner, this 22 day of September, 1975:

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APPENDIX

AFFIDAVIT

STATE OF OHIO
COUNTY OF FRANKLIN
SS

Lieutenant Thomas A. Waters, being first duly sworn, deposes and says that on the 23rd day of April, 1972, at approximately 8:00 p.m., affiant was present at a rally being held for defendant Charles Ross at the steps of the Columbus City Hall, in the City of Columbus, County of Franklin, State of Ohio; Affiant further says that attorney William M. Kunstler made the following statement to a crowd of approximately 1,000 persons:

> Judge Fais wouldn't let Mr. Ross have a courtroom; he wouldn't let Mr. Ross have a lawyer; . . . You know what I say to Judge Fais, fuck him!

THOMAS A. WATERS

Sworn to and subscribed before me this 13th day of June, 1973.

CARL T. WOLFROM
Notary Public
for the State of Ohio

Supreme Court, U. S.
FILED
SEP 23 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-63

CHARLES O. ROSS,

Petitioner,

vs.

HONORABLE FRANK REDA, Judge,
Franklin County Municipal Court,

Respondent.

SUPPLEMENTAL BRIEF AND EXHIBIT TO THE PETITION FOR CERTIORARI, PURSUANT TO RULE 24(5), AND PETITIONER'S RESPONSE TO "MOTION TO AFFIRM"

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SUPPLEMENTAL BRIEF TO
THE PETITION FOR CERTIORARI,
PURSUANT TO RULE 24(5)

Point II of our petition argued that there was a clear conflict between the Sixth and Seventh Circuits as to the scope of a court's power to limit extra-judicial comment by an attorney.

Our petition referred to the conflict between the decision of the Sixth Circuit in this case and that of the Seventh Circuit in Chase v. Robson, 435 F. 2d 1059 (1970).

Since the presentation of our petition, the Seventh Circuit has rendered an additional decision dealing with this issue, in which the conflict with the Sixth Circuit is sharpened. See, Chicago Council of Lawyers v. Bauer (7th Cir., 1975). That opinion deals extensively with the Constitutionality of a local rule of the United States District Court of Illinois which is in the precise language of DR 7-107 involved in this case (compare App. B of Bauer opinion and 7a attached to our petition for certiorari). The Bauer opinion declares unconstitutional many of the provisions of that rule which the Sixth Circuit assumed to be Constitutional.

We include as an exhibit to this supplemental brief a copy of the slip opinion of the Seventh Circuit in the Bauer case.

PETITIONER'S RESPONSE TO "MOTION TO AFFIRM"

Respondent's opposition, characterized as a "Motion to Affirm," is, with respect to two issues, literally a re-submission to this Court of a prior brief 1/ --unedited--which, as a result, fails to address petitioner's brief and arguments, takes no account of intervening decisions by this and other courts, and contains gross misrepresentations of fact and law.

I.

ON THE CONFLICT BETWEEN THE SIXTH AND SEVENTH CIRCUITS AS TO RIGHT TO COUNSEL WHEN IT CONFLICTS WITH A CLAIMED POWER OF A LOCAL COURT WITH RESPECT TO PRO HAC VICE ADMISSIONS.

This is one of the issues upon which respondent has re-submitted his earlier brief. The result is that at page 7 we read:

1/ As appears from our reference to "Opinions Below" (p. 2 of the petition), this Court dismissed an appeal and denied a petition for certiorari from the action of the state courts, 415 U.S. 904. The "prior brief" to which we refer is that submitted by the respondent in January 1974 in Case No. 73-1005, then entitled "Motion to Dismiss," in response to the appeal which had been filed by the petitioner. Points D and E of respondent's new brief are literally an unedited reprint. The only significant change is the recharacterization of Professor Ross as petitioner instead of appellant.

> "Petitioner filled the pages of his brief with many cases having no application to the proposition he presents."

There follows a long list of cases which includes many cases which petitioner did not cite.

Since respondent fails to address the petition actually submitted, the result is that he takes no account whatever of the decision by the Seventh Circuit in Banks v. Holder, a copy of which was appended to our petition. Nor does he even note that one of the important issues in this case was actually briefed and orally argued before this Court in the Banks case (p. 26 of the petition).

Respondent's Motion to Affirm dismisses the entire issue of the balance between a court's power as to pro hac vice admissions and a criminal defendant's right to counsel of his choice by using the talismanic term "privilege." Respondent assumes that having so dubbed the right to pro hac vice admission, there are no limits on the state court's power and no Constitutional issues. This Court has long since rejected that analysis. See Schware v. Board of Bar Examiners, 353 U.S. 232, 238, n. 5 (1957); Perry v. Lindeman, 408 U.S. 593, 597 (1972).

The simple fact, as pointed out in our petition (p. 27), is that not only the Sixth and Seventh Circuits but also the Second, Third, and Fourth Circuits have been struggling without guidance from this Court as to the proper balance between the right to counsel guaranteed by the Sixth and Fourteenth Amendments and the power of a local court to regulate pro hac vice admissions of out-of-state attorneys. Respondent's brief nowhere addresses the clear conflict which emerges between the decisions of the Circuit Courts throughout the nation and the need for guidance from this Court.

II.

ON THE CONFLICT BETWEEN THE SIXTH AND SEVENTH CIRCUITS AS TO THE VALIDITY OF A CURBING OF EXTRA-JUDICIAL COMMENT BY AN ATTORNEY.

This point, as to which we have submitted a supplemental brief, is not dealt with at all by the respondent, 2/ upon the claim that petitioner has presented a novel argument that was "definitely not raised in state court proceedings in the prior appeals from the Ohio Court of Appeals and the Ohio Supreme Court" (p. 12, Motion to Affirm).

Respondent misstates the record.

The issue as to the conflict between the Seventh Circuit's ruling in Chase v. Robson and the claim of the Ohio courts as to their power to curb counsel was in this case at the state court level from the very beginning. Indeed, that was the core of the debate between Mr. Kunstler and the court. The Court of Appeals for Franklin County devoted six pages of its opinion to consideration of this point (pp. 47a-52a attached to the petition for writ of certiorari). And in the brief submitted to the Supreme Court of Ohio, Chase v. Robson was cited

2/ On August 25, 1975, before the date respondent's answering brief was due to be filed with this Court, petitioner's attorney advised respondent's attorney of the new Seventh Circuit opinion in Chicago Council of Lawyers v. Bauer, supra, and supplied respondent's counsel with a copy of said opinion, together with a copy of petitioner's supplemental brief.

and the issue discussed. The suggestion, therefore, that this matter was not adequately presented to the state courts is contrary to the record.

III.

AS TO THE KIND OF CONSIDERATION OF ISSUES REQUIRED OF A JUDGE WHO HAS DISPLACED ONE DISQUALIFIED AFTER AN AFFIDAVIT OF PREJUDICE HAS BEEN FILED.

Upon this issue the respondent has again submitted, without editing, his earlier brief. The result is that he has failed to take account of Ward v. City of Monroeville, 409 U.S. 57 (1972), cited and relied on in our petition.

Respondent asserts that "[t]he only workable standard to apply here [i.e., to discern bias, petitioner's Point IV] is whether the [trial court's] rulings are clearly erroneous." Motion to Affirm, p. 17. We submit that under Ward, the proper standard is to determine whether Judge Reda ruled de novo. By his own admission, he did not.

Assuming arguendo that petitioner's burden is to show clear error, the burden is easily met. Two examples will suffice.

First, petitioner had demanded a bill of particulars because the affidavit which constituted the state's pleading merely tracked the statutory language. It failed to advise petitioner of the manner in which he allegedly interfered with police at an emergency.

The right to be specifically informed of the nature of the accusation, so as to have opportunity meaningfully to defend, is fundamental. It is not

satisfied by the mere tracking of statutory generic terms, such as "impair", "impede", and "interfere." Neither the United States Constitution (see Russell v. United States, 369 U.S. 749, 765-66 (1962), and cases therein cited) nor Ohio's laws (see State v. Lewis, 21 O.S. 2d 203, 257 N.E. 2d 59, 62-63 (1970)) can be satisfied by the pleadings which initiated this case. Judge Fais, however, found that petitioner was not entitled to a bill of particulars by, in effect, invoking a pretrial presumption of petitioner's guilt: "the information sought is within the defendant's personal knowledge." 3/ This constituted clear error. Cf., Tot v. United States, 319 U.S. 462, 469 (1943); Mullaney v. Wilbur, 95 S. Ct. 1881 (1975).

Second, petitioner alleged that the method of jury selection systematically discriminated against Blacks and young voters, and accordingly moved for appropriate relief. In a supporting memorandum, petitioner demonstrated that the operation of state law precluded inclusion in the venire of any persons who initially registered during the thirty months preceding trial. Because there had been effective voter registration drives among the

3/ Judge Fais also denied the bill of particulars on the alternative ground of untimeliness. The petitioner had earlier moved to dismiss the affidavits as vague and indefinite. The demand for a bill of particulars was made in the wake of Judge Fais's denial of that motion. The bill of particulars was demanded a month before Judge Fais's ruling, and four months before trial was held. Thus, the alternative holding at best involved a highly questionable exercise of discretion and, by his own statement, the successor judge declined to substitute his own discretion for his predecessor's.

Black citizenry of Columbus during the preceding two and a half years and numerous young people had reached voting age during that period, petitioner offered to prove that the jury lists did not constitute a fair cross-section of the adult community.

Judge Fais refused to grant an evidentiary hearing on this (or any other) motion. He treated the motion as a personal attack on the integrity of the jury commissioner:

> "Selection of prospective jurors will be regular and in accordance with law and the Rules of Court... It is almost incomprehensible to this Court that the defendant should challenge or question the integrity and competence of the Franklin County Jury Commissioner and his staff.
>
> "The Court finds this Motion attacking the system of selection of prospective jurors completely without merit, and this Motion is hereby overruled."

In so ruling, Judge Fais erected an irrebuttable presumption that 1) the jury selection procedures established by law conform to Constitutional requirements, and 2) the prescribed procedures are properly implemented. The opinion is clearly erroneous law. 4/ Irrebuttable presumptions cannot exist Constitutionally in the present context.

4/ With this ruling, as with most of the others, Judge Fais offered a procedural justification as an alternative to his substantive determination. Here he contended that the challenge was premature because the jurors had not yet been selected. But the system for selection was already known; hence the challenge to that system was timely.

IV.

RESPONDENT'S CONTENTION THAT PETITIONER DID NOT SUBMIT TO THE STATE COURTS QUESTIONS 2 AND 3.

Respondent contends that questions 2 and 3 were not raised before the state courts and therefore are not properly presented to this Court in the light of Picard v. Connor, 404 U.S. 270 (1971).

We have already pointed out that this contention has no basis in fact as to question 2 (the issue as to curbing extra-judicial statements of lawyers). The same is true with respect to question 3 (the issue as to application of the principles of Cole v. Arkansas, 333 U.S. 196 (1948)).

The first assignment of error in the Supreme Court of Ohio asserted that:

> "The trial court's refusal to permit defendant to be represented by his experienced out-of-state attorney ... violated defendant's right to counsel under the Sixth and Fourteenth Amendments of the United States Constitution, ... and was without factual or legal basis." (Emphasis added.)

Although the intermediate Ohio appellate court had claimed to find justification in the record, the petitioner urged that none existed. Further, petitioner's brief to the Ohio Supreme Court asserted that the intermediate appellate court had distorted the facts of record. In short, the Ohio courts had ample opportunity to correct their own errors--to acknowledge that the trial record would not support the factual imputations announced by the Franklin County Court of Appeals, and that petitioner thereby had been denied due process of law.

To recast the no-basis-in-fact (or distortion-of-the-record) Due Process argument presented to the Ohio courts into the form of a Cole v. Arkansas substituted-rationale Due Process argument, as developed in the petition, creates no conflict with Picard. Picard was concerned with a recasting of a Due Process argument as an Equal Protection argument. This Court there held that the Equal Protection argument must be presented to the state courts in the first instance, so long as there is an available state forum. Here, however, the argument has consistently been Due Process, and the forms in which it has been presented are all variations on a single theme: fundamental fairness.

It is a patent denial of Due Process to rule adversely in the absence of a supporting record. That is what Judges Fais and Reda did. It would be equally wrong to affirm such a ruling, whether this be done without any opinion or by an opinion which substitutes imagined facts for the actual record. The latter is what the Franklin County Court of Appeals did. To argue, as the petitioner did in the Ohio Supreme Court, that the record was distorted by the court below in its knowledge that the trial court's ruling was bereft of record support, is in essence the basis of the present formulation. Our present characterization of the injustice reflects neither new facts nor new theories. Both formulations assert clear error of a fundamental nature, which cannot survive a full and fair examination of the record.

In Vachon v. New Hampshire, 414 U.S. 478 (1974), this Court held that on appeal from a state court, a criminal conviction presenting First Amendment issues will be summarily reversed on

Due Process grounds where the record contains no supporting evidence for an element of the offense. The Vachon holding limits the scope of Picard and supports the presentation of question 3 in our petition. Vachon establishes that a state court determination without record support is always subject to this Court's correction.

V.

AS TO THE IMPACT OF §2254(d).

Respondent insists that the federal courts, on habeas, are "bound to accept factual determinations from lower state courts." Motion to Affirm, p. 22. But the Franklin County Court of Appeals is not a lower state court in the sense of one that makes findings of fact and has power to do so. Respondent is therefore urging that §2254(d) be rewritten judicially so as to make binding on federal courts facts found by a court that lacked power to do so.

VI.

RESPONDENT HAS INTRODUCED SCANDALOUS MATERIAL OUTSIDE THE RECORD.

Respondent, once again, offers a scurrilous affidavit from dehors the record to justify the rulings of Judge Fais, which were rendered prior to the alleged events described in the affidavit (respondent's appendix). Respondent previously offered up this affidavit to the Supreme Court of Ohio, to this Court, to the District Court, and to the Sixth Circuit. On each occasion, petitioner has informed the court of the impropriety, and the

affidavit has been ignored.

Respondent's persistence, at this juncture, serves to demonstrate the truth in petitioner's pretrial contention that he was being victimized by a political persecution. More than two years have passed since a formal complaint was filed with the bar association, setting forth the impropriety--extending to violations of at least two disciplinary rules 5/ -- of knowingly tendering this affidavit for judicial consideration. The bar association has chosen not to proceed on the complaint. As the case now stands, the disciplinary rules adopted by the Ohio Supreme Court can be invoked against an outspoken out-of-state attorney representing an unpopular Black activist client, but are of no apparent force and effect as against an attorney representing the respondent.

Respondent's persistence in presenting this scurrilous material calls for the invocation of Rule 40(5) sanctions. See also, Missouri-Kansas-Texas R.R. v. Texas, 275 U.S. 494 (1927).

Respectfully submitted,

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5/ DR 7-106(c), Subsecs. (1), (3), (6) and (7); DR 1-102(A), Subsecs. (5) and (6).

In the

United States Court of Appeals

For the Seventh Circuit

No. 74-1305

CHICAGO COUNCIL OF LAWYERS, et al.

Plaintiffs-Appellants,

v.

WILLIAM J. BAUER, et al.,

Defendants-Appellees,

and

TERENCE MacCARTHY, et al.,

Intervenors-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.
No. 70 C 2194
EDWIN A. ROBSON, *Judge.*
RICHARD B. AUSTIN, *Judge.*
JAMES B. PARSONS, *Judge.*
HUBERT L. WILL, *Judge.*
BERNARD M. DECKER, *Judge.*
EXECUTIVE COMMITTEE

ARGUED NOVEMBER 18, 1974 — DECIDED AUGUST 4, 1975

Before CASTLE, *Senior Circuit Judge,* SWYGERT, *Circuit Judge,* and WYZANSKI, *Senior District Judge.*[1]

SWYGERT, *Circuit Judge.* The question posed by this appeal is whether the "no-comment" rules of the District Court for the Northern District of Illinois deprive lawyers of their free speech rights under the First Amendment.

[1] The Honorable Charles E. Wyzanski, Jr., Senior Judge for the United States District Court for the District of Massachusetts, is sitting by designation.

The plaintiffs, Chicago Council of Lawyers and seven members of the Chicago bar, brought this action seeking injunctive and declaratory relief on behalf of themselves and all lawyers who practice before the District Court for the Northern District of Illinois. They sought a determination that Rule 1.07 of the District Court's Local Criminal Rules (Appendix A) and Disciplinary Rule 7-107 of the American Bar Association's Code of Professional Responsibility (Appendix B) (which the District Court assumed *arguendo* was incorporated within Local General Rule 8[2]) are unconstitutionally vague and overbroad. The named defendants are the United States Attorney for the Northern District of Illinois, the Marshal for the District Court, and the Clerk of the District Court, all of whom are alleged to participate in the enforcement of these rules.[3] The intervening defendants are attorneys who regularly engage in the representation of defendants in criminal cases in the Northern District of Illinois. Motions to dismiss for failure to state a cause of action were filed on behalf of the defendants and granted by the district judges comprising the Executive Committee of the District Court. The reasons given for the judges' action were incorporated in a "Memorandum and Order" which appears at 371 F. Supp. 689 (N.D. Ill. 1974).

I

The plaintiffs contend that the "no-comment" rules unconstitutionally restrict lawyers' rights to comment publicly on pending litigation, and to hear and read such public coment by other lawyers because the rules are not restricted to situations which present a "clear and present

[2] General Rule 8 reads in part:

Rule 8. Discipline of Attorneys; Reinstatement.

The Executive Committee may order the disbarment or suspension of any attorney who (1) has been convicted of a felony in any federal, state or territorial court, or (2) has been disbarred or suspended by any such court. After notice and opportunity to respond, the judges of the Executive Committee may order the disbarment or suspension of any attorney who (1) has resigned from the bar of another court, or (2) has been convicted of a misdemeanor, or (3) is found to have committed acts of professional misconduct prejudicial to the orderly administration of justice such as fraud, deceit, malpractice or failure to abide by the provisions of the Canons of Ethics of the American Bar Association.

[3] The district court apparently determined that the proper defendants were named and we assume this to be true for the purposes of this appeal.

danger of a serious and imminent threat to the administration of justice." They argue that lawyers are entitled to full First Amendment rights and that the "reasonable likelihood of interference with a fair trial" standard employed by these rules is unconstitutional. Collaterally, the plaintiffs contend that many of the rules are constitutionally infirm because they are either vague or overbroad or both. Before discussing the separate rules, some general comments are in order.

Plaintiffs say that they do not ask constitutional protection for comment on litigation that "*in fact* affects or poses a clear and present danger to the administration of justice" or "*in fact* constitutes a serious and imminent threat to the administration of justice." They acknowledge the right of courts to protect their trials and to take all reasonable means to ensure a fair trial to every litigant. The plaintiffs argue that fair trials are not in issue because they "do not seek to protect lawyers' comments that actually impair the ability of the trial court to afford fair trials." Finally, they maintain that there is no need to "balance" the First Amendment rights of lawyers against litigants' due process rights to fair trials since these two rights do not compete.

We are not as sanguine as plaintiffs that there is no competition or conflict between the right of lawyers to free speech and the right of litigants to fair trials. If by noncompetition they mean that from an ideal or abstract view the two rights can and should coexist without disharmony, we might agree; however, pragmatically, in everyday situations there are bound to be conflicts. Consequently, when irreconcilable conflicts do arise, the right to a fair trial, guaranteed by the Sixth Amendment to criminal defendants and to all persons by the Due Process Clause of the Fourteenth Amendment, must take precedence over the right to make comments about pending litigation by lawyers who are associated with that litigation, if such comments are apt to seriously threaten the integrity of the judicial process. We do not understand the plaintiffs to take a contrary position. That courts have the duty to ensure fair trials—"the most fundamental of all freedoms"[4]—is beyond question. The Supreme Court

[4] *Estes* v. *Texas*, 381 U.S. 532, 540 (1965).

made this clear in *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966). Moreover, the Court in that case settled the corollary proposition that courts have the power to "take such steps by rule and regulation that will protect their processes from prejudicial outside interferences." 384 U.S. at 363.

The statement of these general propositions leads us a step further to a solution of the issue raised in this appeal. Since the right of free speech must give way to the right of a fair trial when there is an irreconcilable conflict, the next inquiry relates to the limits of the circumscription on comment that lawyers can be required to observe consistent with their rights under the First Amendment.

A preliminary issue that should be addresses is whether we are to evaluate such rules as "prior restraints." A restriction deemed a prior restraint may not be per se unconstitutional, but it does come before us "with a 'heavy presumption' against its constitutional validity." *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415, 419 (1971). It is important to note, however, Mr. Justice Frankfurter's admonition that the phrase "prior restraint" not be deemed a "self-wielding sword" nor a "talismanic test." *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436, 441 (1957). Our case presents a perfect example of a situation in which the meaning behind the phrase should be examined. Admittedly, the rules in question have some elements similar to that which we have traditionally termed "prior restraints." A violation of the rules can be punished by the contempt power just like a failure to obey an injunction. The full criminal procedural safeguards, including the right to trial by jury, would not necessarily be available. Punishment by contempt is an important attribute of a "prior restraint" that distinguishes it from a criminal statute that forbids a certain type of expression.

But in an equally important aspect these rules differ from a "prior restraint." Normally a "prior restraint" constitutes a predetermined judicial prohibition restraining specified expression and it cannot be violated even though the judicial action is unconstitutional if opportunities for appeal existed and were ignored. *See Walker* v. *City of Birmingham,* 388 U.S. 307 (1967). The validity of court

rules, however, can be challenged by one prosecuted for violating them since we have held that there is a fundamental distinction in this regard between actions taken by the court in its legislative role and those taken in its adjudicative role. *In re Oliver,* 452 F. 2d 111 (7th Cir. 1971).

The conclusion we reach from this analysis is that we cannot label the no-comment rules as "prior restraints" given the connotations of that term, but we do recognize that these rules have some of the inherent features of "prior restraints" which have caused the judiciary to review them with particular care. Thus, while we do not begin our examination with a "heavy presumption" against validity, we are aware of the fact that these court rules must endure even closer scrutiny than a legislative restriction.

This scrutiny centers on certain constitutional standards relating to clearness, precision, and narrowness. Rules which deny a lawyer his First Amendment rights in the interest of a fair trial must be neither vague nor overbroad. As the Supreme Court said in *Grayned* v. *City of Rockford,* 408 U.S. 104, 109 (1972):

> [W]here a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." (footnotes omitted).

In *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960), the Supreme Court discussed the matter of overbreadth:

> In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basis purpose. (footnotes omitted).

We should keep in mind that extrajudicial comments which might impair the "orderly and fair administration

of justice in a pending case," *Bridges* v. *California,* 314 U.S. 252, 263 (1941), must be measured as other utterances are measured that are proscribed by reason of a counter-compelling governmental interest. "[T]he limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved." *Procunier* v. *Martinez,* 416 U.S. 396, 413 (1974).

Given these constitutional standards for guidance, we must ask: What test should apply to extrajudicial comments of lawyers about a pending proceeding that are apt to affect the fairness of the proceeding and therefore may be curtailed?

We are of the view that the rubric used in the rules under consideration, that lawyers' comments about pending or imminent litigation must be proscribed "if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice" is overbroad and therefore does not meet constitutional standards. Instead, we think a narrower and more restrictive standard, the one formulated in *Chase* v. *Robson,* 435 F.2d 1059, 1061-62 (7th Cir. 1970), and reaffirmed in *In re Oliver,* 452 F.2d 111 (7th Cir. 1971), should apply: Only those comments that pose a "serious and imminent threat" of interference with the fair administration of justice can be constitutionally proscribed. Given the objectives of clearness, precision, and narrowness we are of the view that this formulation is more in keeping with the precepts announced by the Supreme Court to which we have alluded than the one used by the local rules of the district court. A lawyer is put on stricter notice if he must gage his intended comments by a test that limits only comments which are a serious and imminent threat of interference with a fair trial than if his statements were governed by the more amorphous phrase: "a reasonable likelihood that such comment will interfere with a fair trial."

We should emphasize at this point, however, that this standard is not constitutionally sufficient by itself. While the application of the standard to these rules can eliminate overbreadth, the specific rules are also necessary in order to avoid vagueness. The rules furnish the context necessary to determine what may constitute a "serious and imminent threat" of interference with the fair administration of justice.

II

A few further general observations are necessary. The fact that it is the comments of lawyers involved in the litigation that is curtailed is of importance to both sides of the issue. Attorneys' statements are often the source of prejudicial publicity,[5] especially since their views and comments are usually accepted by the public on the basis that they come from a wellspring of reliable information. Restricting such comment can be a significant aid in controlling publicity which may affect the fairness of a trial. Thus these rules might be viewed as the "least burdensome alternative" if a partial solution to the problem is accomplished by prohibiting only the speech of a very small group whose members are officers of the court with a special interest in protecting the integrity of our system of justice. Yet there are important countervailing factors. Since lawyers are considered credible in regard to pending litigation in which they are engaged and are in one of the most knowledgeable positions, they are a crucial source of information and opinion. Often their clients will not be as articulate or informed. And despite our primary focus on prejudicial statements, we must keep in mind that there are important areas of public concern connected with current litigation. We can note that lawyers involved in investigations or trials often are in a position to act as a check on government by exposing abuses or urging action. It is not sufficient to argue that such comment can always be made later since immediate action might be necessary and it is only when the litigation is pending and current news that the public's attention can be commanded.

The barring of comment by lawyers representing criminal defendants may seem questionable for a variety of other reasons. The Sixth Amendment speaks only of the right of an accused and the Fifth Amendment only of the right of persons and not of the Government. The publicized

[5] *See* Association of the Bar of the City of New York, Special Committee on Radio, Television, and the Administration of Justice, *Freedom of the Press and Fair Trial, Final Report with Recommendations* (1967) at 14-19.

fact that a person is under investigation or is charged with the commission of a crime makes it difficult for the person involved to counter any injury to himself, his family, or friends caused by the publicity if his attorney is allowed only to say without elaboration that his client maintains his innocence. Under the no-comment rules, the lawyer, who usually is more articulate and more knowledgeable in the law than the accused, can perhaps best speak about such matters as defenses or the reputation of the accused as a law-abiding citizen. Only slight reflection is needed to realize that the scales of justice in the eyes of the public are weighed extraordinarily heavy against an accused after his indictment. A bare denial and a possible reminder that a charged person is presumed to be innocent until proved guilty is often insufficient to balance the scales.

Regardless of these considerations and our disquietude that may be sensed, we nonetheless believe that certain proscriptions on speech can constitutionally be invoked against defense counsel. We must not forget that public justice is no less important than an accused's right to a fair trial. The Reardon Committee drew no difference between the prosecutor and defense counsel when discussing its recommendations relating to the conduct of attorneys.[6]

[6] The Committee's research indicates that, although potentially prejudicial disclosures by lawyers participating in a criminal case are relatively infrequent, they do occur and have on many occasions caused considerable difficulty. Moreover, they are particularly likely to occur in cases that arouse substantial public interest, and in these cases it is not unusual for both sides to become active in courting public favor through the press.

Such conduct by attorneys representing the parties in a criminal proceeding is most reprehensible. The lawyer has a high professional obligation to maintain the integrity of the system he helps to administer. His duty to his client, of course, is cardinal, but that duty does not serve to justify an effort to win a criminal case through resort to the media on matters that must be decided only in the courtroom. . . . If a public official violates the standards of conduct in releasing information, the Committee believes that the appropriate response by defense counsel is not to debate the merits of the case in the media but to seek the imposition of judicial discipline and to protect his client by resort to one or more of the remedies described in Part III of the recommendations. Indeed, public debate of the merits may well aggravate the prejudice to the defendant, particularly if it induces a further response by the prosecution, and may render more difficult the obtaining of judicial relief. (footnotes omitted). Advisory Committee on Fair Trial and Free Press, ABA Project on Minimum Standards for Criminal Justice, *Standards Relating to Fair Trial and Free Press*—Approved Draft (1968) at 80-86.

Finally, and more important, we are mandated by *Sheppard* v. *Maxwell*, 384 U.S. 333, 363 (1966), to acknowledge that rules adopted by courts relating to attorneys conduct and the protection of fair judicial proceedings should cut both ways:

> The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures. 384 U.S. at 363.

III

These rules as they now read are, in our opinion, constitutionally infirm. This general infirmity results from a failure to specifically incorporate within each provision the serious and imminent threat standard. We do not believe that there can be a blanket prohibition on certain areas of comment—a per se proscription—without any consideration of whether the particular statement posed a serious and imminent threat of interference with a fair trial. Yet these rules establish such a blanket prohibition whereby even a trivial, totally innocuous statement could be a violation. The first Amendment does not allow this broad a sweep.

Still, we think there is a place and need for specific provisions in properly drawn rules. Lawyers must be aware of exactly what areas of speech might pose a serious and imminent threat of interference with a fair trial. The serious and imminent standard must always be an element of any prohibition.[7] We think that it is proper to formulate rules which would declare that comment concerning certain matters will presumptively be deemed a serious and imminent threat to the fair administration

[7] The district court did hold that the "reasonable likelihood" standard embodied in the general statement in Local Rule 1.07(a) was to apply to all succeeding paragraphs.

of justice so as to justify a prohibition against them. One charged with violating such a rule would of course have the opportunity to prove that his statement was not one that posed such a serious and imminent threat, but the burden would be upon him.

We find that with the inclusion of a generally applicable serious and imminent threat standard, many of the challenged rules could be considered as rules establishing such a presumption. Of course, allowing this type of presumption is itself a serious limitation of free speech. Each provision of these rules must be examined to determine whether the particular restrictive presumption is a proper basis for such a limitation.

IV

We proceed then to the specific rules, examining first the no-comment rules relating to criminal matters. Most of the literature[8] and debate have centered on the problem of prejudicial publicity in criminal trials. As we have previously noted the Supreme Court set the stage for court rules in this area by its observations in *Sheppard* v. *Maxwell.*

Local Rule 1.07 was in substantial part drawn verbatim from the suggested rules of the Kaufman Report which was prepared by twelve federal judges and ultimately adopted by the Judicial Conference of the United States. We think it is our duty, however, to examine the specific recommendations of this prestigious committee for it was acting in a legislative rather than an adjudicatory capacity. *See In re Oliver,* 452 F.2d 111 (7th Cir. 1971). With deference, we must dissect the rules and subject them to constitutional scrutiny.

[8] Various studies and reports have been published including: Advisory Committee on Fair Trial and Free Press, ABA Project on Minimum Standards for Criminal Justice, *Standards Relating to Fair Trial and Free Press,* Approved Draft (1968) [hereinafter cited as the Reardon Report]; Committee on the Operation of the Jury System, Judicial Conference of the United States, *Report of the Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue* (Sept., 1968), reported in 45 F.R.D. 391 [hereinafter cited as the Kaufman Report]; Association of the Bar of the City of New York, Special Committee on Radio, Television, and the Administration of Justice, *Freedom of the Press and Fair Trial, Final Report with Recommendations* (1967) [hereinafter cited as the Medina Report].

The rules[9] pertaining to comment relative to criminal matters are divided according to the different stages of the criminal process. Rule 1.07(b) and DR 7-107(A) proscribe statements[10] during the investigative stages. These prohibitions are quite restrictive, but this is an unusual time frame in the prosecutorial process. While no one will have been formally charged with a crime, there may be great interest in the news media in the subject of the investigation. With new developments constantly occurring, the potential for prejudicial publicity is considerable. Moreover, since there are no formal court proceedings pending there is no opportunity to obtain a specific pretrial order limiting out-of-court statements. We can at least note that the mere statement that a particular individual is the subject of a grand jury investigation can have serious ramifications. The secrecy of grand jury proceedings must be strictly maintained.

Regardless of these considerations there are serious problems with this section of the rules. The phrase "participating in or associated with the investigation" is ambiguous when applied to lawyers other than prosecutors. Does it cover attorneys representing witnesses before a grand jury? What about attorneys for individuals or corporations who are rumored to be the subject of an investigation? How much interchange with the prosecutors need they have before they become "associated with the investigation"? We cannot tell and neither could the conscientious attorney trying to determine if he could speak on behalf of his client. Indeed, the rules do not even allow a statement that the individual in question denies any involvement in any criminal activity. Nor may the attorney publicly charge an abuse of the grand jury

[9] Local Rule 1.07 and DR 7-107(A)-(E) are substantially the same except that there is no counterpart to Rule 1.07(a) which is a general introductory section indicating that lawyers should make no public statements which would have a "reasonable likelihood" of interference with a fair trial or prejudice. We assume that this section or one like it would never be cited by itself as a basis for an alleged violation, since there are specific sections with particularized restrictions covering all phases of "pending or imminent criminal litigation." *See* Reardon Report at 84-85.

[10] Although we refer throughout the opinion to restrictions or "statements" or "comment," only those that "a reasonable person would expect to be disseminated by means of public communication" are covered by these rules.

proceedings. The investigatory stage is not actually a part of the judicial process. The discretion is placed in the executive—the prosecutor. An important check on his use of that discretion is the political process. It is imperative that we allow as much public discussion as feasible about the way in which this authority is being exercised. The scope and purpose of an investigation is a legitimate subject for public concern and comment. Those in the best position to inform the public on that issue should be free to do so.

The section under discussion is too vague in terms of its application to attorneys other than those involved on behalf of the Government. More important, the restrictions are too broad for the benefit that may be derived. No one knows at that stage if a prosecution will develop and if there will be a trial that must be protected. It is unlikely that an attorney would attempt a "newspaper defense" of charges that have not been formally lodged. The possibility of prejudice to the Government's case which has not even been presented by indictment or information is too remote in view of the countervailing interests to justify these restrictions on nonprosecution attorneys.

Those attorneys involved in the investigation for the Government are in a different position. They have the ability to influence and ensure proper governmental procedure without resort to public opinion. Moreover, they know what charges may be brought and are a prime source of damaging statements. Admittedly, our formulation may place prosecutors in a difficult position since they may be criticized for a particular investigation but may not publicly respond. This is a situation that competing interests necessitate. Ultimately the prosecutor's response will come in the form of an indictment or information or else the investigation will have ended and his speech will be unrestricted. We conclude that Rule 1.07(b) and DR 7-107(A) could be used as a presumption of a serious and imminent threat, but only as to attorneys associated with the investigation on behalf of the Government.

V

Local Rule 1.07(c) and DR 7-107(B) and (C) regulate comments by attorneys during the time from arrest or the

filing of charges to commencement of trial or disposition without trial. Comments on six subjects are prohibited. Some general views concerning all six are necessary. There are areas in which "legitimate" reasons exist for attorneys' comment during a criminal case. The most important of these is in regard to an attorney's opinions and arguments about the unconstitutionality or injustice of a statute or rule. During the course of a criminal proceeding an attorney would be in a unique position to examine and criticize such legislation. Again there is the importance of the time factor in terms of gaining the public's attention. Ideally, we would want such views expressed in the abstract without reference to the particular case that is pending. Practically, it may not always be possible to differentiate the two. Still, we should recognize the importance of such criticism.

Other types of comment deserve mention. The particulars of a case might be deemed a necessary subject of public commentary in certain instances. As we said earlier there is a societal interest in having the discretion of the prosecutor's office reviewed.[11] This interest still exists after the presentation of formal charges, but the countervailing factors are different. The possibility of prejudice is more concrete. There is also an interest in preventing the appearance that the merits of a particular pending prosecution are being tried in the press. A formal controversy that should be settled by the courts is in existence. The balance swings more toward the necessity of prohibiting certain speech at this stage in the criminal judicial process.

One final reason a conscientious attorney might wish "to take his case to the public" is to solicit defense funds. This type of solicitation is a legitimate function. But again it is countered by the factors just discussed. Moreover, our present judicial system has its own solutions for the problem of the defendant without funds.

Cognizant of these considerations, the specifics of DR 7-107(B) can be examined. The provisions of DR 7-107(C)

[11] Such public criticism may be particularly vital when "political dissidents" have been indicted. *See* Comment, *Silence Orders—Preserving Political Expression By Defendants and Their Lawyers*, 6 Harv. Civ. Rights — Civ. Lib. L. Rev. 595 (1971).

which relate to what may be announced are irrelevant to our discussion except insofar as they limit the restrictions of DR 7-107(B).[12] (Local Rule 1.07(c) is substantially the same as DR 7-107(B) and (C).)

DR 7-107(B)(1) prohibits communication concerning "character, reputation, or prior criminal record." The possible prejudicial effect of negative comments on such matters is self-evident. Yet supportive statements by defense counsel can also be prejudicial since the Government is entitled to a fair trial and all opinion as to good character and reputation is not admissible evidence. Still, as we indicated earlier, it can be argued that whereas this restriction is proper for prosecutors it should not apply to defense counsel. The prosecutor has in a sense made his "statement" by the filing of an information or indictment. An accused would arguably want his attorney to "defend" his name in public.[13] But the issue that would be involved in such a "defense" is the very issue to be decided at trial. The public's conclusion should be based on the trier of fact's conclusion rather than vice versa. We conclude that the no-comment restriction embodied in DR 7-107(B)(1) would be constitutionally permissible if subject to the standards formulated in Parts I and III of this opinion.

DR 7-107(B)(2) prohibits comment on the possibility of a plea of guilty. Such comment, obviously inadmissible at trial, could be highly prejudicial. Although the public may have a legitimate interest in a discussion of the use of plea bargains by the prosecutors, sufficient information is available when pleas are actually entered. Certainly this tenuous relationship would not invalidate this provision given the lack of any other need for this type of comment.

DR 7-107(B)(3) prevents comments relative to confessions or statements by the accused. Disclosures concerning such matters are fraught with almost incurable prejudice.

[12] It seems anomolous that DR 7-107(C)(7) allows public disclosure of physical evidence seized, since one apparent policy of DR 7-107(B) is to prevent comment about matters that might be inadmissible. There is always the possibility, that the evidence seized may be suppressed on constitutional grounds.

[13] DR 7-107(C)(11) does allow an attorney to publicly state that his client denies the charges brought against him.

They could infringe on a defendant's Fifth Amendment privilege. In view of the natural tendency to draw an adverse inference from the assertion of the privilege and the careful attempts to avoid comment about such a choice during a trial, it seems that courts at least can require that attorneys who publicly discuss such matters must prove that their comment was not of the type that poses a serious and imminent threat of interference with a fair trial. Also, confessions or statements may ultimately be suppressed. The judicial system, in this context, has the right to expect that its own officers will not make public that which should not reach a juror. We conclude that there is no overriding purpose in allowing such comment and that it could be identified as a presumptively prohibited subject.

DR 7-107(B)(4) applies to results of examinations or tests or refusal to take them. Here again much of what just has been said is applicable: highly prejudicial material; possible involvement of constitutional rights; narrow restrictions limited to facts of defendant's case; and little chance of infringement on communication relating to an important public concern. This provision, with the proper standard, would not violate the First Amendment.

The fifth category of prohibited comment, DR 7-107(B)(5), involves "identity, testimony or credibility of a prospective witness." It might be argued that there is an overbreadth problem in using the term "prospective witness." We assume, however, that this provision is meant to apply to statements about persons in their role as potential witnesses. Viewing the entire provision we again find a narrow prohibition concerning a potentially prejudicial subject related almost exclusively to the particular case at issue. The need to provide a fair and unbiased trial could justify this type of limitation, if subjected to the proper standards formulated in Parts I and III.

The final restrictive clause, DR 7-107(B)(6), is the broadest and most troublesome. It encompasses "[a]ny opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case." It is important to note that the provision refers exclusively to "opinion" of

the attorney and thus should be given special scrutiny. The prohibition on opinion as to guilt or innocence is permissible since this is a traditional ethical requirement in the legal profession and such an opinion could never properly be offered in court. The attorney is allowed to state that the accused denies the charges. Opinions on "the evidence" could not be offered without either giving information about the evidence or an opinion as to guilt or innocence. These are personal opinions related only to the specific case and they too can be deemed a proper area for application of the presumption. The provision that causes us the most concern is the prohibition on opinions as to "the merits of the case." We are not sure what is encompassed by the term "merits." Arguably a general statement that an attorney believes a statute is unjust is an opinion on the merits of a pending case if his client is charged with violating that criminal provision. The same might be true for a general comment regarding court rules or procedure. But as already discussed these are the type of comments, if they are made abstractly, that should not be restricted. If a gloss on the word "merits" reflecting our concern was explicitly incorporated in a properly drawn rule we think this term could properly be used within a rule constituting a presumption of a serious and imminent threat.

VI

Comment during the selection of a jury or during trial is governed by one general provision. DR 7-107(D) prohibits comment "that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial." Rule 1.07(d) mentions only trial, parties, or issues and does not include "or other matters."

Both formulations constitute a broad prohibition. On the other hand the time frame is a special one. The period of time in which the restriction is in effect is relatively limited even in the case of a lengthy trial. More important, it is the stage in which there is likely to be the most intense news coverage and therefore creates the most need to ensure that inadmissible opinions or statements do not encroach upon the laboratory conditions of the

trial. A provision such as Local Rule 1.07(d) can be the basis for a presumption if the appropriate serious and imminent standard were incorporated.

There is, however, a serious vagueness problem associated with the phrase "or other matters" employed in DR 7-107(D). We have trouble envisioning matters relating to something other than the trial, parties, or issues that could pose a serious and imminent threat of interference with a fair trial. We do not think that attorneys should be faced with considering whether a comment on any "other matter" could pose a serious and imminent threat. This portion of DR 7-107(D) is unconstitutionally vague.

There are two other contentions of plaintiffs that should be discussed. The first is that this section could never be used as a presumption of a serious and imminent threat unless it provides an exception for cases in which there is a sequestered jury. The argument is that there would be no need for a restriction because public statements would not reach the triers of fact. But this view assumes that a trial judge will never change his mind and release a sequestered jury. Then, there is always the possibility that an unedited newspaper or broadcast might reach even a sequestered juror. Given that counsel can always request that the provisions of a rule be relaxed in a specific case, we find no overbreadth problem in this regard.

Plaintiffs also urge that the rule could not constitutionally apply in cases of bench trials.[14] The issue is whether attorneys' out-of-court comment could ever be presumptively said to pose a serious and imminent threat of interference with a fair trial when the trier of fact is a life-tenured judge. Plaintiffs point to language in the general contempt power cases such as that in *Craig* v. *Harney*, 331 U.S. 367, 376 (1947): "But the law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a

[14] This argument would not be applicable to the rules concerning the earlier stages of the criminal process because it usually is not known for sure until the time of trial whether there will be a jury involved.

hardy climate." Defendants counter with language contained in *Cox* v. *Louisiana,* 379 U.S. 559, 565 (1965):

> It is, of course, true that most judges will be influenced only by what they see and hear in court. However, judges are human; and the legislature has the right to recognize the danger that some judges, jurors, and other court officials, will be consciously or unconsciously influenced by demonstrations in or near their courtrooms both prior to and at the time of the trial. A State may also properly protect the judicial process from being misjudged in the minds of the public. Suppose demonstrators paraded and picketed for weeks with signs asking that indictments be dismissed, and that a judge, completely uninfluenced by these demonstrations, dismissed the indictments. A State may protect against the possibility of a conclusion by the public under these circumstances that the judge's action was in part a product of intimidation and did not flow only from the fair and orderly working of the judicial process.

As plaintiffs argue, *Cox* involved expression mixed with conduct rather than pure speech and this was one of the bases upon which the Supreme Court distinguished the general contempt cases. The Court, however, also drew the distinction that *Cox* concerned a statute proscribing specific behavior, namely, picketing, with intent to interfere with the administration of justice, near a courthouse. Here we are reviewing rules, legislative in character, that also proscribe specific conduct, though in broader terms. We conclude that both the contempt cases and *Cox* are relevant, though not dispositive on this issue.

The factor that we find important is the possibility that improper or prejudicial material will reach the trier of fact only by way of extrajudicial comment. It is true, of course, that such matter often comes to the attention of a judge during a bench trial since he must still rule on admissibility, and we must assume that he can reach his verdict only on the basis of the admissible evidence. This does not mean, however, that we can overlook the fact that this is a difficult task, for "judges are human." If prejudicial material can be kept from ever coming to

the attention of a judge a potential benefit is derived. It is a benefit that could justify the applicability of rules to bench trials. Unlike the general contempt power cases there is more involved here than merely insulating judges from public opinion based on certain known facts. We agree that life tenure is sufficient for this purpose. Properly drawn rules can perhaps prevent the necessity of a judge attempting to remove from his mind information that should not be considered. Also, the rule can prevent the appearance of decisions based on improper evidence, though we do not think this factor delineated by *Cox* is determinative. We hold therefore that there should be no distinction between bench trials and jury trials.

VII

The final provision relating to criminal proceedings, DR 7-107(E), prohibits any comment during the period between completion of trial and sentencing that is "reasonably likely to affect the imposition of sentence." Plaintiffs' attack on this section is again premised on the concept that insulation of a judge from outside statements is not a sufficient necessity to justify this imposition on speech even if the provision incorporated a serious and imminent threat standard. In reference to this provision we concur with plaintiffs' contention.

Unlike the prohibition on comment during a bench trial, there is very little possibility that any factual matter that could not be presented in court would be communicated to the judge by way of extra-judicial comment of attorneys. This is because a judge is entitled to consider almost any factor in exercising his sentencing discretion. He may conduct an inquiry "largely unlimited either as to the kind of information he may consider, or the sources from which it may come." *United States* v. *Tucker,* 404 U.S. 443, 446 (1972). *See also Williams* v. *New York,* 337 U.S. 241 (1949).

The justification for a no-comment rule during this stage of the criminal process must be that judges should have an opportunity to arrive at an appropriate sentence free of public pressure. The assumption is that lawyers'

statements could initiate or increase such pressure. We think it clear, however, that this consideration is not of sufficient magnitude to authorize this restriction in the case of life-tenured federal judges. We read the Supreme Court general contempt cases as indicating that the First Amendment does not authorize restrictions on "pure speech" merely for the purpose of protecting judges from criticism. *E.g., Bridges* v. *California,* 314 U.S. 252, 273 (1941). We therefore hold that comment restricted by Rule 1.07(e) and DR 7-107(E) could never be deemed a serious and imminent threat of interference with the fair administration of justice.

VIII

Although all of the previously mentioned literature considered only the "fair trial-free press" issue in regard to criminal cases, we are also presented with the task of evaluating no-comment rules appliacble to attorneys associated with civil actions. Local Rule 1.07 is limited to criminal matters, but DR 7-107(G) is a specific provision for all stages of civil litigation and is incorporated by Local General Rule 8.

Again some preliminary observations are necessary. In the context of these restrictions on attorneys' comment it is important to note particular distinctions between civil and criminal litigation. First, we should recognize that although we rightfully place a prime value on providing a system of impartial justice to settle civil disputes, we require even a greater insularity against the possibility of interference with fairness in criminal cases. Perhaps this is symbolically reflected in the Sixth Amendment's requirement of an "impartial jury" in criminal cases whereas the Seventh Amendment guarantees only "trial by jury" in civil cases. The point to be made is that the mere invocation of the phrase "fair trial" does not as readily justify a restriction on speech when we are referring to civil trials.

Another vital factor is the length of civil litigation. Normally, civil litigation will be more prolonged than criminal litigation. One reason is that priority is afforded criminal matters because of the constitutional right to a

speedy trial. Also, our civil rules allow much more discovery than our criminal rules. A civil case may last for years just in the discovery stage. DR 7-107(G) is not geared to specific time frames. It provides for blanket coverage of the period of "investigation or litigation." We are not sure of the parameters of an "investigation" of a civil matter, but given rather lengthy statutes of limitations we assume that there might be a restriction on speech for many years before a complaint is even filed. And the use of the general term "litigation" implies that attorneys' comments are also proscribed while a case is on appeal. The criminal no-comment rules contain no restrictions on statements made after sentencing. It is clear that DR 7-107(G) cannot be deemed a prohibition on speech that applies only for a limited period. Restrictions for many years are quite possible. Therefore, the broad time span of this rule relating to civil matters is an influential factor weighing against its constitutionality.

Finally, there is the element of the nature of certain civil litigation. As plaintiffs indicate, in our present society many important social issues became entangled to some degree in civil litigation. Indeed, certain civil suits may be instigated for the very purpose of gaining information for the public. Often actions are brought on behalf of the public interest on a private attorney general theory. Civil litigation in general often exposes the need for governmental action or correction. Such revelations should not be kept from the public. Yet it is normally only the attorney who will have this knowledge or realize its significance. Sometimes a class of poor or powerless citizens challenges, by way of a civil suit, actions taken by our established private or semi-private institutions or governmental entities. Often non-lawyers can adequately comment publicly on behalf of these institutions or governmental entities. The lawyer representing the class plaintiffs may be the only articulate voice for that side of the case. Therefore, we should be extremely skeptical about any rule that silences that voice.

Viewing the five general areas of proscribed comment relating to civil litigation, we hold that individually and collectively they would be constitutionally impermissible if

deemed presumptively prohibited. The first section of the rule prevents any public statements concerning the evidence regarding the matters in the case. Such a broad restriction might prevent an attorney from informing the public about the government's manner of performing certain tasks since testimony about these practices would probably be relevant evidence. For instance, in an airplane crash case an attorney who discovered that unsafe flight procedures were in effect and were being condoned by government regulatory agencies could not impart this vital knowledge to the public because it almost certainly would also constitute a part of his evidence. The performance or results of tests, which cannot be the subject of public comment by reason of DR 7-107(G)(3), also may contain such crucial information. The need for informed and complete discussion of this type of issue far outweighs any possible benefit that might accrue in terms of maintaining the laboratory conditions of a civil trial.

Arguably, the most defensible portion of this civil rule is DR 7-107(G)(2) which restricts comment concerning the "character, credibility, or criminal record of a party, witness or prospective witness." On balance we do not think even this limited aspect of the rule should stand. Usually there would be little need or ethical justification for statements in this vein. At times, however, comments of this type might be appropriate. Statements and actions of public officials are often involved in civil lawsuits and may be the impetus for suits. The public has a legitimate interest in the character and credibity of both elected and appointed officials. Attorneys involved in certain litigation may have a unique opportunity to evaluate the public statements made by officials. We think they should be allowed to offer their opinions and the bases for them without having to await the completion of lengthy litigation. Some remote possibility of our being unable to ensure an impartial trial is simply not a sufficient countervailing factor.

The fourth prohibition in the rule relates to an "opinion as to the merits of the claims or defenses of a party." This provision is so broad that it covers legal issues. Thus, an attorney involved in a case could not even

write a law review article concerning any aspect of the matter. And if the case is one involving "public policy considerations" the attorney could not offer his views on the social issue. Yet his involvement in the suit would show his interest in and familiarity with the question. An informed viewpoint would be removed from the public forum without justification. We can envision little benefit from this prohibition and find that as drawn it would conflict with the very purpose of the First Amendment.

Finally, we have the catchall provision proscribing public comment on "[a]ny other matter reasonably likely to interfere with a fair trial of the action." This vague provision could not stand even with the substitution of what we have declared to be the correct standard. Its chilling effect is obvious. If some restriction is necessary in a particular case then perhaps a specific order can be entered supported by a record showing its necessity and the unavailability of a narrower restriction. We need not decide that issue here. We do recognize the great benefits derived from allowing uninhibited comment by knowledgeable attorneys involved in civil litigation. This is the same type of recognition embodied in the First Amendment.

The judgment of the district court is reversed and the cause is remanded for entry of appropriate relief in accordance with this opinion.

WYZANSKI, *Senior District Judge*, concurring: Judge Swygert's thorough opinion, prepared after full review of the authorities and mature consideration of basic principles and suppositious cases, commands my respect. Yet the nature of this proceeding raises questions whether as a matter of discretion it is consistent with the *prudent* exercise of discretionary judicial power under Article III of the United States Constitution, under the Declaratory Judgment Act, and under other statutes conferring jurisdiction upon the federal courts, for this court to pass judgment upon imaginary cases sometimes scorned as "a parade of horribles."

This action seeks injunctive and declaratory relief with respect to the constitutionality of virtually every pro-

vision of the complex, lengthy provisions of Rule 1.07 of the Local Criminal Rules adopted by the United States District Court for the Northern District of Illinois, and of so much of that same Court's Local General Rule 8 (applicable to civil cases) as is derived from Disciplinary Rule 7-107 of the American Bar Association's Code of Professional Responsibility. In general, plaintiffs complain that the rules cited are so vague and overbroad as to deny the due process of law guaranteed by the Fifth Amendment to the Constitution, the freedom of speech guaranteed by the First Amendment, and other constitutional guarantees implicit in Article III and the Fifth and Sixth Amendments.

It is plain that the complaint is not frivolous. Without pausing to underline the careful critique in Judge Swygert's detailed analysis, there are provisions which indubitably deny or chill the exercise by lawyers of some recognized constitutional rights fundamental to civic and professional privileges, duties, and interests. An attempt by a court to enforce some of these restrictions would be unconstitutional, and if plaintiffs are to be fully protected with respect to those rights it is appropriate that they be judicially vindicated promptly without leaving plaintiffs to act at their peril.

Yet this action invites, in advance of a specific invocation of any rule in the form of a disciplinary or punitive action, a scrutiny of all the complex provisions of a total code of professional conduct in a broad branch of the profession of advocacy. This code has been adapted from drafts prepared after prolonged, highly competent work by professional committees of judges and lawyers of distinction and experience. They, like ourselves, of course, may have erred. They, like ourselves, were acting not in relation to immediate controversies arising out of actual conflict, but in relation to hypothetical cases which they foresaw or feared.

In short, those committees, like the District Court, were exercising a quasi-legislative function.

It might have been proper and preferable for the Circuit Council of this Seventh Circuit to have reviewed in a like *legislative* manner those or any other rules of the

District Court for the Northern District of Illinois. But that is not not the nature of this proceeding. Here we have what purports to be an Article III "case" or "controversy." We are asked to make an adjudication. That adjudication will constitute a precedent and may have other binding consequences. Yet inasmuch as it is not addressed to specific, concrete facts it also partakes of the nature of an advisory opinion with all the dangers inherent in such speculative judgments.

Of course the advisory and sweeping aspects of the opinion do not imply that the case is beyond our judicial *power* under Article III or any other provision of the Constitution, or under the provisions of the Declaratory Judgment Act, or under the governing principles for the exercise of equity jurisdiction.

Yet there is ground for us to weigh carefully the good sense and wisdom of our exercising our discretion whether to render a judgment upon the questions presented when we, like those who drafted the rules, are necessarily relying more on imagination than on a factual record.

It might be prudent to decline, as a matter of discretion, to deliver an opinion or to enter a judgment detailing our views on the difficult constitutional matters presented, on which perhaps we are not better qualified than the original draftsmen. We might wait for the harvest to discern the wheat and the tare.

Yet, after mature deliberation, I am content to concur in the admirable opinion of Judge Swygert, although I think it may be desirable to state the reasons that induce my concurrence.

Freedom of speech, particularly in the area of professional responsibility, is a prized value in our society. The restraints upon that freedom which are embodied in these rules, unless they are constitutionally valid, would gravely affect justice. To remit those who are faced with unconstitutional restraints solely to litigation *after* they had acted would impair their liberties, chill freedom of expression, and sacrifice important public interests. Judge Swygert's opinion convincingly demonstrates that those are not fanciful dangers.

I have not doubt that in each and every instance where Judge Swygert's opinion condemns as unconstitutional a specific provision of the rules his judgment is sound.

Perhaps I am less clear that those provisions of the rules which pass muster in Judge Swygert's discriminating and thoughtful opinion would be certain to be upheld in a later case which arose upon a record of concrete conflict which had occurred in a specific instance. But if at a later date a state of facts does further illumine an issue, this declaratory judgment ought not to be regarded as an indistinguishable precedent nor an insurmountable obstacle.

Furthermore, I am not unmindful that, particularly since other courts are now wrestling with the issues here invoked—see, for example, the litigation in the New York state courts to which reference is made in the July 13, 1975 *New York Times*—it would probably be helpful to other judges, as it has been to me, and presumably to the bar and bench of this Circuit, to have published the penetrating and persuasive analysis prepared by Judge Swygert. Hence I concur in his opinion.

CASTLE, *Senior Circuit Judge*, dissenting in part.

It is apparent from a reading of the District Court's Local Criminal Rule 1.07 that 1.07(a) is designed to state generally the *duty* of counsel in connection with extra judicial comment concerning criminal litigation with which he is associated, and that the remaining subdivisions of the Rule (1.07(b)—1.07(e)) are intended to proscribe, within the applicable time frame designated in each, comment concerning particular subject matter which constitutes a *breach* of that duty.

I dissent from the majority opinion insofar as it may be taken as requiring as a condition to the constitutional validity of Rule 1.07 that the element of "reasonable likelihood" be eliminated from the standard which is to govern and measure counsel's duty in the premises. It is my view that the overbreadth of Rule 1.07 lies only in its proscription of any comment which "will interfere" with

a fair trial or "otherwise prejudice" the due administration of justice without regard to whether the interference or prejudice is both serious and imminent. Thus, I agree with the majority that to satisfy First Amendment rights of counsel the Rule must additionally incorporate both the elements of seriousness and imminence. Merely trivial, insubstantial interference or prejudice, or a remote possibility of interference or prejudice, is not sufficient to justify proscription. But comment, which if publicly disseminated,[1] would produce a "reasonable likelihood" of serious and imminent interference with or prejudice to a fair trial or the due administration of justice is subject to proscription. And, from my understanding of the relevant decisions, I find no First Amendment or other constitutional basis for requiring that the District Court be limited in its mode of expressing the governing standard to a parroting of the "poses a serious and imminent threat" phraseology this Court saw fit to employ in the *Chase* v. *Robson* and *In re Oliver* opinions cited by the majority. In the context here involved a "reasonable likelihood" of resulting serious and imminent interference or prejudice is certainly a standard equally as definite as "poses a serious and imminent threat" of interference or prejudice.

A rule incorporating the "reasonable likelihood" element as well as the "serious and imminent" factors is well within the scope of remedy advocated in *Sheppard* v. *Maxwell*, 384 U.S. 333, 363, where the Court, after declaring that "the trial courts must take strong measures," pointed out:

> ". . . reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take steps by rule and regulation that will protect their processes from prejudicial outside interference."

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[1] Rule 1.07, in this respect is expressly confined to extrajudicial comment which "a reasonable person would expect to be disseminated by means of public communication."

APPENDIX A

1.07 PUBLIC DISCUSSION BY ATTORNEYS OF PENDING OR IMMINENT CRIMINAL LITIGATION

(a) It is the duty of the United States Attorney, or a lawyer or law firm not to release or authorize the release of information or opinion which a reasonable person would expect to be disseminated by means of public communication, in connection with pending or imminent criminal litigation with which he or the firm is associated, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.

(b) With respect to a grand jury or other pending investigation of any criminal matter, the United States Attorney or a lawyer participating in or associated with the investigation shall refrain from making any extrajudicial statement which a reasonable person would expect to be disseminated by means of public communication, that goes beyond the public record or that is not necessary to inform the public that the investigation is underway, to describe the general scope of the investigation, to obtain assistance in the apprehension of a suspect, to warn the public of any dangers, or otherwise to aid in the investigation.

(c) From the time of arrest, issuance of an arrest warrant, or the filing of a complaint, information, or indictment in any criminal matter until the commencement of trial or disposition without trial, the United States Attorney, or a lawyer or law firm associated with the prosecution or defense shall not release or authorize the release of any extrajudicial statement which a reasonable person would expect to be disseminated by means of public communication, relating to that matter and concerning:

(1) The prior criminal record (including arrests, indictments, or other charges of crime), or the character or reputation of the accused, except that the lawyer or law firm may make a factual statement of the accused's name, age, residence, occupation, and family status, and if the accused has not been apprehended, the United

States Attorney may release any information necessary to aid in his apprehension or to warn the public of any dangers he may present;

(2) The existence or contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make any statement;

(3) The performance of any examinations or tests or the accused's refusal or failure to submit to an examination or test;

(4) The identity, testimony, or credibility of prospective witnesses, except that the lawyer or law firm may announce the identity of the victim if the announcement is not otherwise prohibited by law;

(5) The possibility of a plea of guilty to the offense charged or a lesser offense;

(6) Any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case.

The foregoing shall not be construed to preclude the United States Attorney, or a lawyer or law firm during this period, in the proper discharge of his or its official or professional obligations, from announcing the fact and circumstances of arrest (including time and place of arrest, resistance, pursuit, and use of weapons), the identity of the investigating and arresting officer or agency, and the length of the investigation; from making an announcement, at the time of seizure of any physical evidence other than a confession, admission or statement, which is limited to a description of the evidence seized; from disclosing the nature, substance, or text of the charge, including a brief description of the offense charged; from quoting or referring without comment to public records of the court in the case; from announcing the scheduling or result of any stage in the judicial process; from requesting assistance in obtaining evidence; or from announcing without further comment that the accused denies the charges made against him.

(d) During the trial of any criminal matter including the period of selection of the jury, no United States Attorney, or lawyer or law firm associated with the prosecution or defense shall give or authorize any extrajudicial statement or interview, relating to the trial or the parties

or issues in the trial which a reasonable person would expect to be disseminated by means of public communication, except that the United States Attorney, or lawyer or law firm may quote from or refer without comment to public records of the court in the case.

(e) After the completion of a trial or disposition without trial of any criminal matter, and prior to the imposition of sentence, the United States Attorney, or a lawyer or law firm associated with the prosecution or defense shall refrain from making or authorizing any extra-judicial statement which a reasonable person would expect to be disseminated by means of public communication if there is a reasonable likelihood that such dissemination will affect the imposition of sentence. (Amended effective March 9th, 1971)

APPENDIX B

DR 7-107 Trial Publicity.

(A) A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration:

(1) Information contained in a public record.

(2) That the investigation is in progress.

(3) The general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim.

(4) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.

(5) A warning to the public of any dangers.

(B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:

(1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.

(2) The possibility of a plea of guilty to the offense charged or to a lesser offense.

(3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.

(4) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.

(5) The identity, testimony, or credibility of a prospective witness.

(6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

(C) DR7-107(B) does not preclude a lawyer during such period from announcing:

(1) The name, age, residence, occupation, and family status of the accused.

(2) If the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.

(3) A request for assistance in obtaining evidence.

(4) The identity of the victim of the crime.

(5) The fact, time, and place of arrest, resistance, pursuit, and use of weapons.

(6) The identity of investigating and arresting officers or agencies and the length of the investigation.

(7) At the time of seizure, a description of the physical evidence seized, other than a confession, admission or statement.

(8) The nature, substance, or text of the charge.

(9) Quotations from or references to public records of the court in the case.

(10) The scheduling or result of any step in the judicial proceedings.

(11) That the accused denies the charges made against him.

(D) During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not

make or participate in making an extra-judicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote from or refer without comment to public records of the court in the case.

(E) After the completion of a trial or disposition without trial of a criminal matter and prior to the imposition of sentence, a lawyer or law firm associated with the prosecution or defense shall not make or participate in making an extra-judicial statement that a reasonable person would expect to be disseminated by public communication and that is reasonably likely to affect the imposition of sentence.

• • •

(G) A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extra-judicial statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication and that relates to:

(1) Evidence regarding the occurrence or transaction involved.

(2) The character, credibility, or criminal record of a party, witness, or prospective witness.

(3) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.

(4) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.

(5) Any other matter reasonably likely to interfere with a fair trial of the action.

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A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

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